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ABSTRACT

Each issue in this bicentennial series features articles on selected U.S. Constitution topics, along with a section on primary documents and lesson plans or class activities. Issue 14 features: (1) "The Political Economy of the Constitution" (K. Dolbeare; L. Medcalf); (2) "A 'New Historical Whooper': Creating the Art of the Constitutional Sesquicentennial" (K. Marling); (3) "The Founding Fathers and the Right to Bear Arms: To Keep the People Duly Armed" (R. Shalhope); and (4) "The Founding Fathers and the Right to Bear Arms: A Well-Regulated Militia" (L. Cress). Selected articles from issue 15 include: (1) "The Origins of the Constitution" (G. Wood); (2) "The Philadelphia Convention and the Development of American Government: From the Virginia Plan to the Constitution" (P. Maier); and (3) "Society and Republicanism: America in 1787" (J. Henretta). Featured in issue 16 are: (1) "'The Federalist'" (J. Yarbrough); (2) "The Constitutional Thought of the Anti-Federalists" (M. Dry); and (3) "The Constitution as Myth and Symbol" (M. Klein). Issue 17 features: (1) "'Our Successors Will Have an Easier Task': The First Congress Under the Constitution, 1789-1791" (J. Silbey); (2) "The 'Great Departments': The Origin of the Federal Government's Executive Branch" (R. Baker); and (3) "The Birth of the Federal Court System" (D. Eisenberg and others). Issue 18, the last chronicle in this series, features eight articles on the Bill of Rights and three articles on the future of the Constitution. Photographs and related resources are included, and issue 18 contains an index for issues 1-17. (JHP)

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THIS CONSTITUTION: A BICENTENNIAL CHRONICLE

NOS. 14-18

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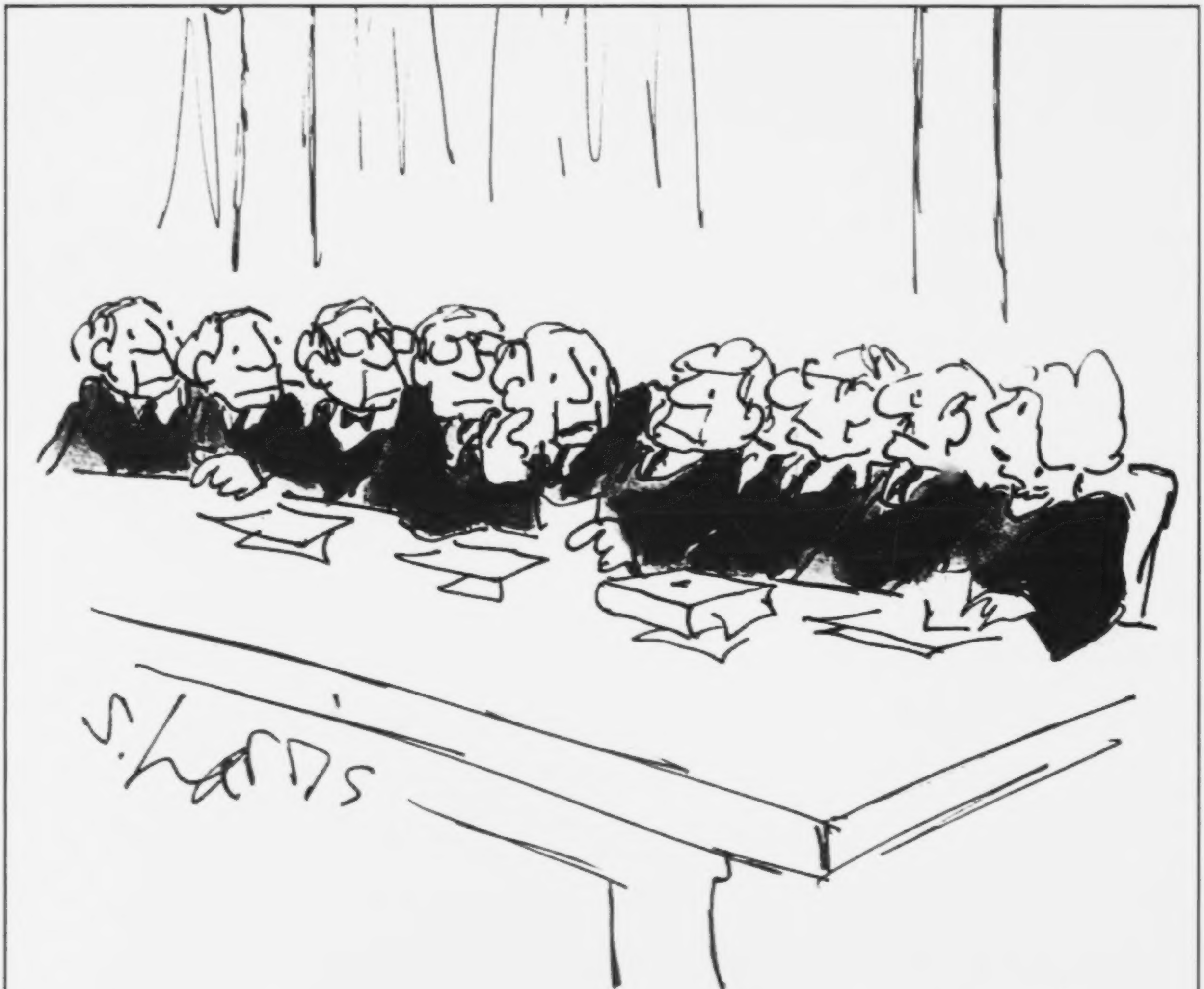
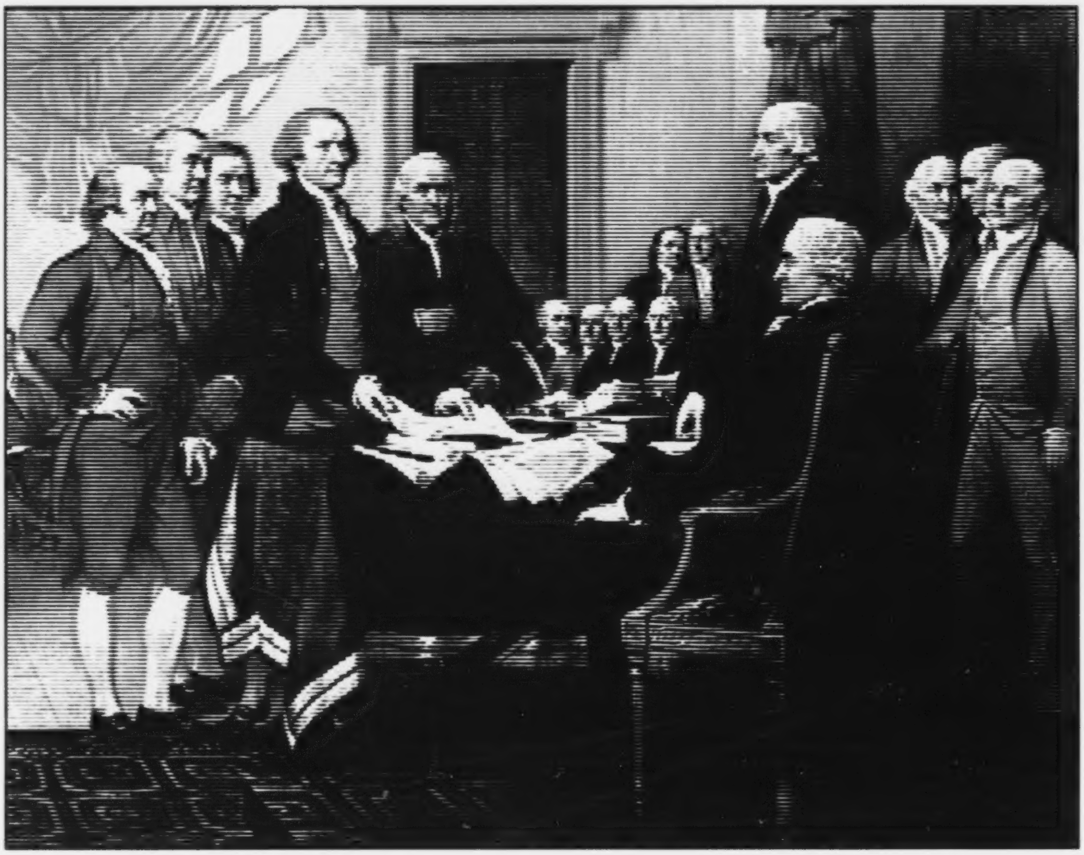
A Bicentennial Chronicle Spring 1987, No.14



"SINCE WE DON'T HAVE ANY CASES TODAY, I WANT YOU ALL TO GO HOME AND WRITE AN ESSAY ON WHICH IS YOUR FAVORITE AMENDMENT, AND WHY."

The Call to the Federal Convention by the Confederation Congress



On September 14, 1786, the twelve delegates from five states who met at Annapolis drafted a resolution that proposed a meeting "at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union." The commissioners at Annapolis felt that propriety demanded that they address themselves only to the states they represented, but they decided "from motives of respect," to send the proposal to "the United States in Congress assembled" as well. The Congress of the Confederation received the motion and referred it to committee. Finally, on February 21, 1787, it considered the suggestion and offered its "opinion" that such a convention was "expedient," but only for "the sole and express purpose of revising the Articles of Confederation," and reporting back to Congress and the state legislatures. With this guarded imprimatur, the delegates at Philadelphia convened to draft what would be an entirely new constitution.

Whereas there is provision in the Articles of Confederation of perpetual Union for making alterations therein by the assent of a Congress of the United States and of the legislatures of the several States; and whereas experience hath evinced that there are defects in the present Confederation, as a mean to remedy which several of the States and particularly the State of New York by express instructions to their delegates in Congress have suggested a convention for the purpose expressed in the following resolution and such Convention appearing to be the most probable mean of establishing in these states a firm national government.

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.

Source: Transcription of Secretary Charles Thomson's official journal of the Congress, 21 February 1787, in *The Constitution: Evolution of a Government, Teachers' Guide* (National Archives and SIRS, Inc. [1985]), p. 37.

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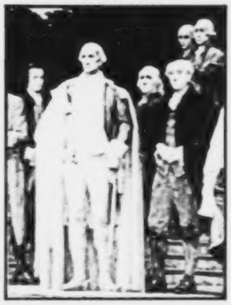

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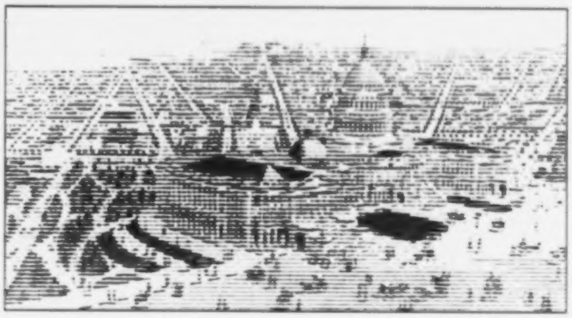

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From the Editor

The "Enduring Constitutional Issue" of property rights and economic policy serves as the theme for ***this Constitution*** in Spring 1987. The Constitution determines the economic structure of the nation, Kenneth Dolbeare and Linda J. Medcalf argue in "The Political Economy of the Constitution," a discussion of the economic views of the founders. In our "For the Classroom" section, Peter R. Senn and William J. Stepien, in a lesson originally from the *Senior Economist*, offer ideas for teaching about the Constitution as an economic framework.

If the Constitution is an economic document, it is also a cultural one. Karal Ann Marling describes how Sol Bloom, the director of the Sesquicentennial celebration, met the challenge to create a vivid representation of the Constitution for that commemoration.

Our "Documents" article reviews the impact of the Constitution as a social instrument. A 1954 Supreme Court decision in the case of *Brown* v. *Board of Education* decreed that segregation provided black students with an intrinsically "unequal" setting in which to learn. Hugh W. Speer, one of the expert witnesses in the original *Brown* trial, presents excerpts from the testimony and the arguments in that famous suit, in an article entitled "The Case of the Century."

The issue also includes a parley, an occasional feature offering two perspectives on a single issue. Here, Robert E. Shalhope and Lawrence Delbert Cress debate the meaning to the founding generation of the Second Amendment, guaranteeing to Americans the right to bear arms.

Two special essays in this issue are particularly timely. Chief Justice William H. Rehnquist discussed "Presidential Appointments to the Supreme Court" in a speech at the University of Minnesota in 1984. We are pleased to reprint his remarks here. And since, in addition to marking the Bicentennial of the Constitution, 1987 is also the Bicentennial of the Northwest Ordinance, we include an excerpt from a piece by Phillip R. Shriver on that important subject.

The September 1986 issue of ***this Constitution*** observed the Bicentennial of the Annapolis meeting that asked Congress to call a convention in Philadelphia in 1787. The response to that request by the Confederation Congress is reprinted on the inside front cover of this issue: the call to the states to send delegates to Philadelphia "for the sole and express purpose of revising the Articles of Confederation." That gathering in Philadelphia, of course, created the Constitution.

A list of state Bicentennial commissions and state humanities councils, all of whom can provide program planners and interested citizens with information about local events this year, ends this issue. As we have reported in the pages of ***this Constitution***, the entire country will commemorate the Bicentennial of the Constitution this year and in the four years after with a wide array of engaging, entertaining, and educational programs. It will be a fitting celebration.

Thirteen Enduring Constitutional Issues

- National Power—Limits and Potential
- Federalism—the Balance between Nation and State
- The Judiciary—Interpreter of the Constitution or Shaper of Public Policy
- Civil Liberties—the Balance between Government and the Individual
- Criminal Penalties—Rights of the Accused and Protection of the Community
- Equality—its Definition as a Constitutional Value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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The Political Economy of the Constitution

by KENNETH M. DOLBEARE AND LINDA J. MEDCALF

The U.S. Constitution deserves to be celebrated for creating an effective political system both adapted to the realities of its era and capable of withstanding the test of time. But if we applaud the achievement of the framers for crafting a successful political instrument, we often overlook the fact that the Constitution also sustains a particular economic and social system. The concept of "political economy" assumes that fundamental social and political values and choices shape the economy as well as the society and the polity. Conversely, the nature of the economy carries consequences for the social and political structures and practices co-existing with it. In the eighteenth century, both the framers of the Constitution *and* the citizens knew that drafting and ratifying a constitution, a *founding* document, meant making fundamental economic and political choices about the world they wanted to build.

In the late 1700s, there were at least two contending visions of the future American political economy—one agricultural, one commercial. Their struggle for supremacy characterizes much of our early history. The framers and the Constitution they drafted gave a critical advantage to the rising commercial economy, with its need for national uniformity and central government support. To appreciate the extent of the victory, we must recall some history and analyze the document in the light of those contending visions.

The "Failures" of the Articles

The aftermath of the Revolutionary War brought severe economic dislocations and hardships for many. Federal and state governments faced massive wartime debts. Individuals of all social classes became debtors as they attempted to rebuild farms and homes as well as purchase those consumer goods which had been unavailable during the war. Farms and businesses, neglected during the War, were unable to produce enough to meet their loan payments; foreclosures were widespread. Great Britain appeared likely to bankrupt American artisans and merchants and resume her previous dominance through a flood of goods into American markets.

In an attempt to find a way out of the economic difficulties, various leaders began to call for revision of the 1781 Articles of Confederation by which the several states had formed a "perpetual" union. In 1786, the Virginia legislature called for a convention of all the states to meet in Annapolis, Maryland.

> to take into consideration the *trade* and *commerce* of the United States; to consider how far an uniform system, in their commercial intercourse and regulations, might be necessary to their common interest and permanent harmony, and to report to the several States such an act relative to this great object, as when unanimously ratified by them, would enable the United States, in Congress assembled, effectually to provide for the same.

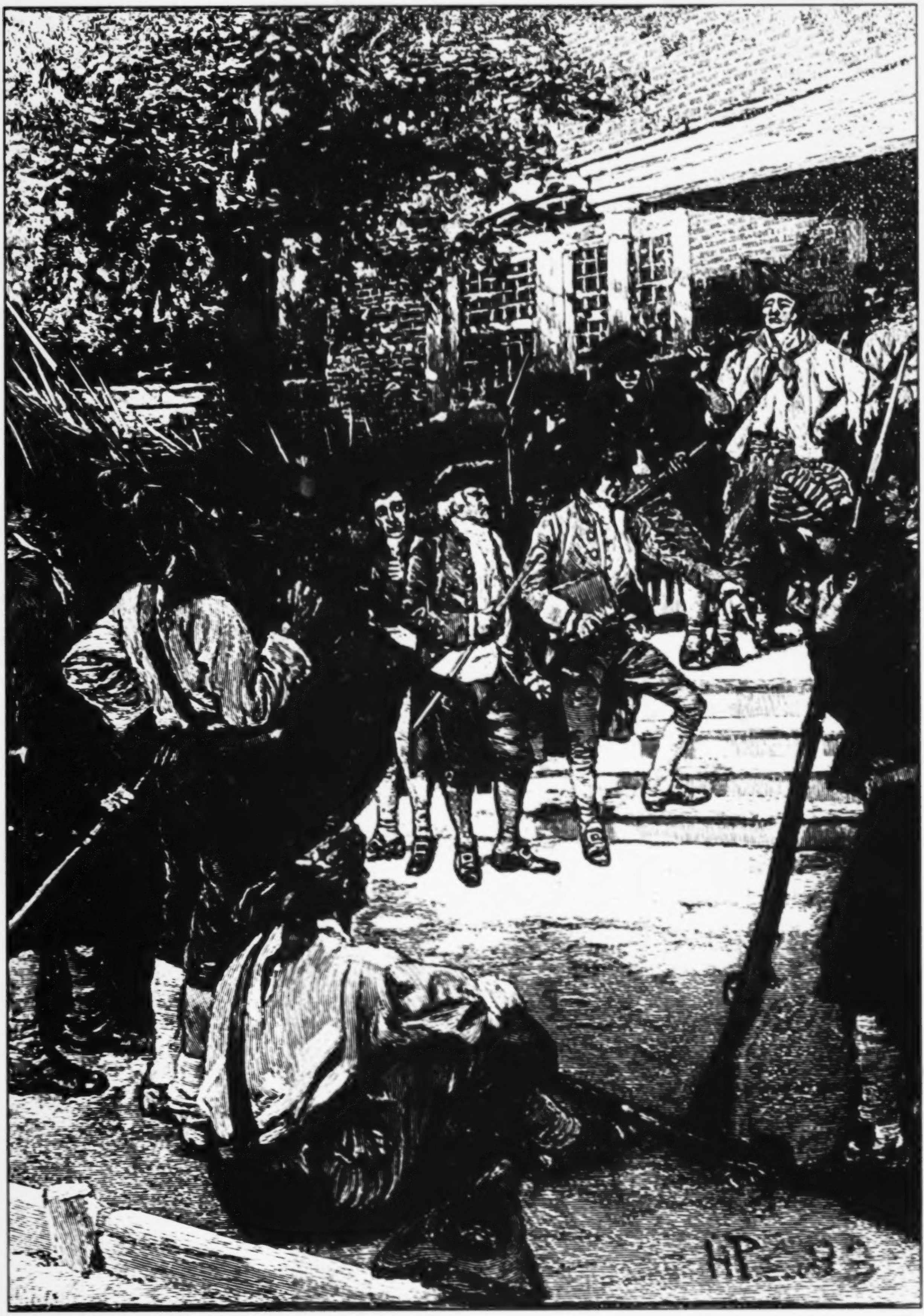
Conventional wisdom now concurs with the resolutions of that poorly-attended Annapolis Convention, that the Articles of Confederation were to blame for the apparent failure of the government. But what exactly was it that the Articles failed to accomplish? Was it merely that the central government was "weak," as is so often alleged, or were there more specific flaws in its nature and powers? The answer to this question offers insight into both the conditions that led to the Constitutional Convention and the goals that animated many of its members. But it is important to keep in mind that the driving force for reform in the political structure arose out of concerns with "trade and commerce."

The United States of the post-Revolutionary era was still primarily agricultural in character. Nearly self-sufficient small farmers predominated in the North and West, with a combination of smaller farms and great plantations in the South. All of these interests strongly believed in the notion of rights to property, and particularly to the possession of land. Property, to them, was based in tangible possessions—the farm, its stock, the house and harvest. Indeed, such beliefs were a major force behind the Revolution itself.

But now the threat to their farms and property rights came from home-based creditors in the major cities. Eastern banks, merchants, and financiers had loaned the money enabling land to be cleared and developed and settlement to extend inland. They too were hard-pressed by debts and the failure of the Congress to honor its obligations. Money had to come from somewhere—and the producers on the land were available and vulnerable.

These economic pressures led many farmers to seek the aid of their state governments to prevent loss of their farms. They wanted the states to pass laws that would authorize printing new money, or to permit debt payment in wartime paper money or personal possessions or goods, or to delay payment of loans or prevent foreclosures in various ways. Most states faced tremendous pressure to pass paper money laws, and many did so.

The farmers' complaints, therefore, were not primarily with the Articles of Confederation. They fo-



Shays' Mob in possession of a courthouse, by Howard Pyle.

But if we applaud the achievement of the framers for crafting a successful political instrument, we often overlook the fact that the Constitution also sustains a particular economic and social system.

cused on the banks, financiers, and other creditors whose demands for repayment of loans in hard currency (gold and silver) threatened their property. Though there were debtors' riots in several states, the most famous is Shays' Rebellion, which took place in Massachusetts in 1786–1787. The farmers' frustration with lawyers, the courts, and the state government's support for creditors exploded into more organized action. Daniel Shays, a typical indebted farmer who had served as a captain in the Revolutionary War, led hundreds of his armed neighbors in a campaign to close the courts and end foreclosures. His angry band succeeded for a period of weeks, but was ultimately dispersed and the authority of the courts restored by state militia from Boston.

These were not the men who called for revisions in the Articles. Their major complaint with the Articles, if any, focused on internal defense. They needed the western boundaries defended against Indians and the British (who were stubbornly refusing to move out of their westernmost forts) and the ability to move further west under some protection. Otherwise, they much preferred that the locus of power remain in their states, or, even better, the immediate locality where their influence could be exercised and their numbers felt.

Merchants, financiers, fledgling manufacturers, traders and the like made up the other major economic component of the post-Revolutionary United States. Though concentrated in the older cities along the Atlantic coast, their business activities were pushing ever deeper into the backwoods settlements, more or less consciously seeking to build a national market economy that would transcend state boundaries. They also sought to become part of the international economy, with its various markets. They wanted to restore the kind of national and international commerce, with hard money, sound credit, and enforceable taxing and debt collection systems, that had formerly existed under the rule of the British crown. The difference, of course, would be that such a system would work to their benefit and not to the advantage of British investors and trading companies.

To this commercial/financial sector, Shays' Rebellion and similar debtor unrest was profoundly disturbing. They feared that the states' printing of more paper money would result in "soft money" inflation. Increasing farmer/debtor strength in the legislatures and local courts of the individual states was making debt collection ever more difficult. The commercial/financial sector truly believed that active resistance and political pressure on state governments by indebted farmers threatened the destruction of property rights, disruption of social order and sound government, and a descent into chaos and anarchy.

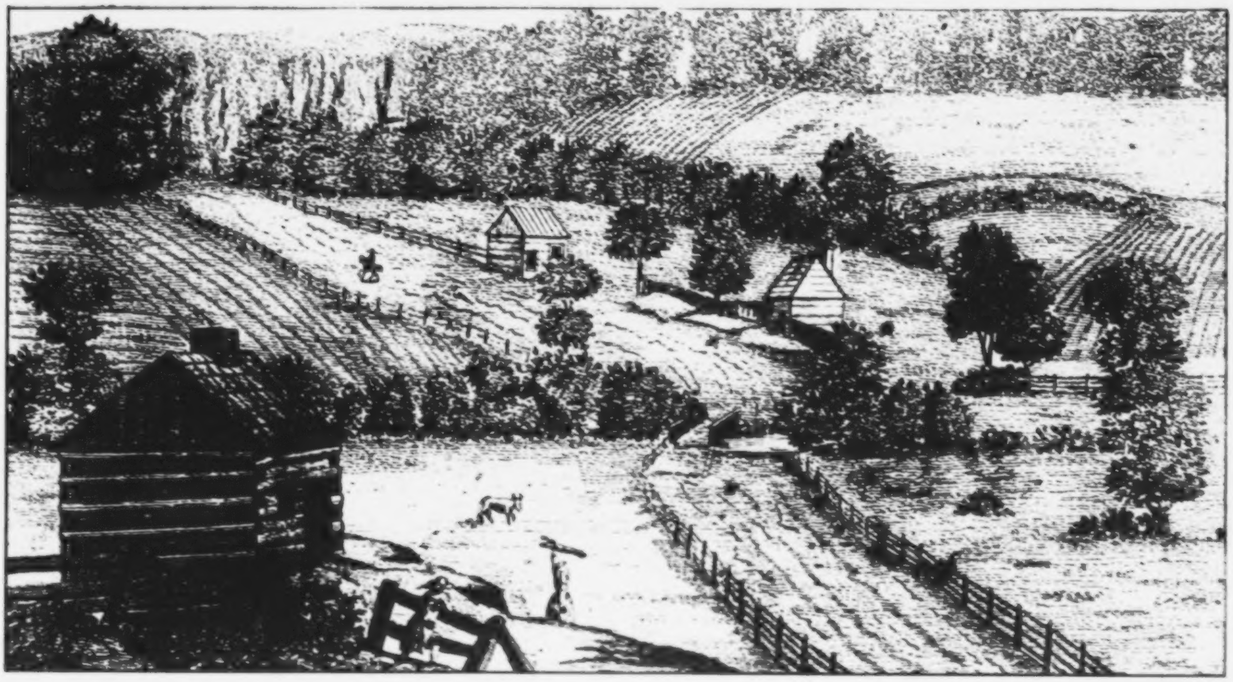
The commercial sector needed a powerful *national* government sufficiently removed from popular unrest that it could protect states against their own citizens if necessary. Their preferred government would defend the hard money (gold and silver) that made for a sound economy, develop an open national market through uniform laws that took precedence over state parochialism, and prevent British goods from underselling American products. It had to be a government with the power to tax effectively, in order to repay its outstanding debts and maintain solid credit with its own citizens as well as the international commercial community.

Clearly, the government created by the Articles of Confederation was not such a government. It lacked every major power that the commercial interests deemed essential. Unselfconsciously equating their own needs with those of the nation generally, the rising commercial interests concluded that prosperity would elude the United States until a more powerful government with a whole new set of economic powers "adequate to the exigencies of the Union" (in the words of the Annapolis Convention) was instituted.

Thus, the future identity of the new nation was at stake in the Constitutional Convention of 1787 and the ratifying debates of 1787–1788. Today, it seems only natural and inevitable that the U.S. should have emerged as a leading commercial nation. But in 1787–1788 there was a *choice*. People understood there was a choice—to remain primarily a self-sufficient agricultural nation of small farmers and yeoman or become a growing international commercial power. The new Constitution, growing out of concerns with "trade and commerce," reflected the commercial vision of America's future. The commercial interests fought for a vision of a total political economy which they had written into a founding document—and won.

The New National Economy

The strength of a nation's economy and the distribution of wealth within it are profoundly affected by the stability of its currency and the availability (and cost) of capital and credit. The powers granted to the Congress in the new Constitution in Article I, Section 8, amount to a framework for a new fiscal system. Most importantly, the new Congress could declare what would constitute money and could control



Farm five miles from York, Pa., 1788. Library of Congress.

its value (Article I, Section 8, Clause 5). The states, by contrast, were prohibited from coining money, emitting bills of credit, and allowing anything but gold and silver coin as the basis for paying debts (Article I, Section 10, Clause 1). The states were thus excluded from participation in shaping the nature and value of the country's currency, and, not coincidentally, from responding to the pressures to issue paper money or define what would be "legal tender" for the payment of debts. (Some of those states had been actually contemplating making produce, such as wheat, legal tender!) Unstated, of course, was the prospect that gold and silver, the traditional "hard money" of bankers and creditors, would now reign unchallenged as the basis of the economy.

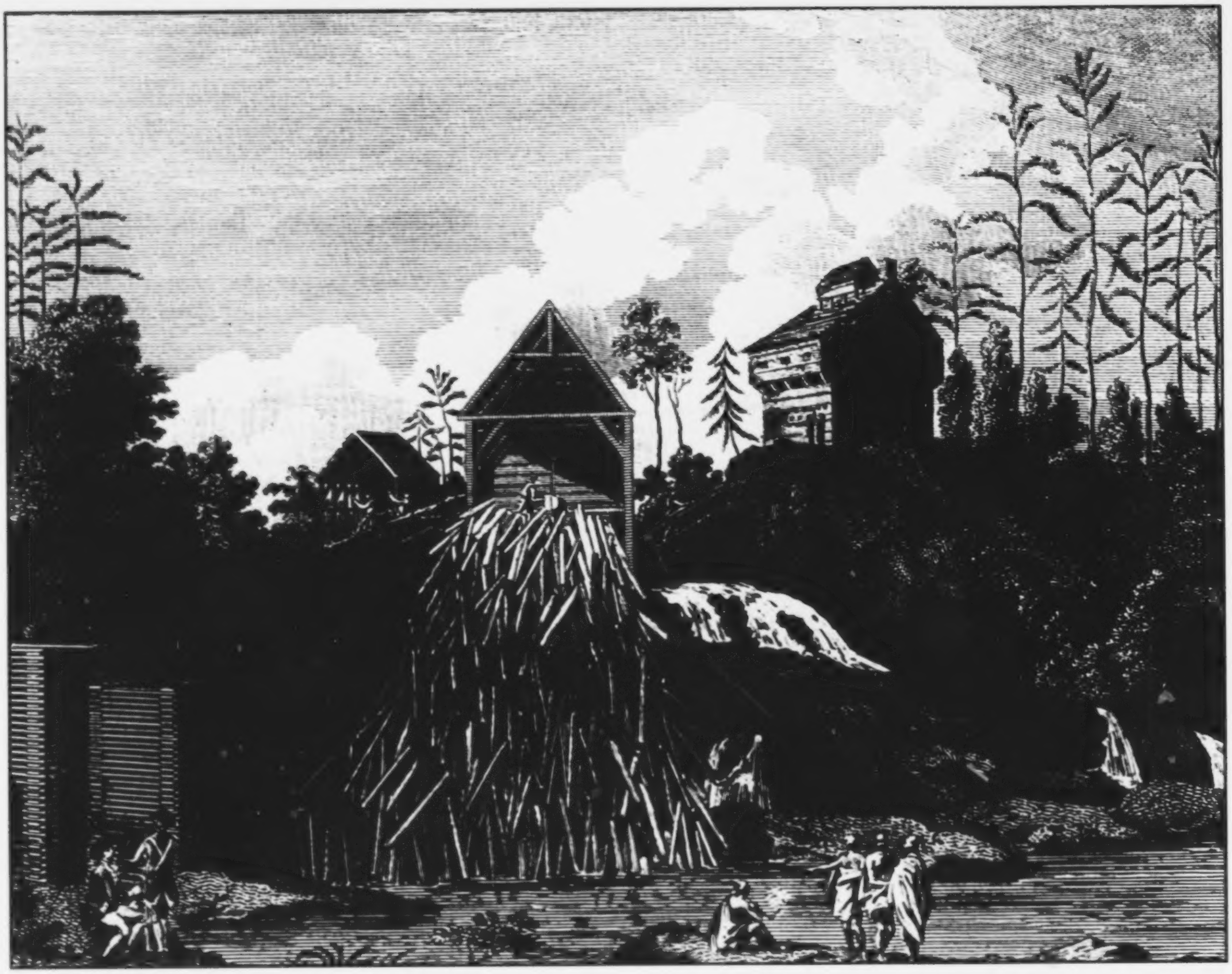
Almost as important as the value of money and the availability of capital and credit for a future commercial economy was the financial strength of the national government itself. In the new Constitution, as in the Articles before it, the debts entered into before its adoption were accepted as valid obligations (Article VI, Clause 1). But in this instance, the Congress was granted power to lay and collect the necessary taxes, and, as we shall see in the next section, this power was now made enforceable. The new government could not only pay its prior debts, but also any future ones it might contract. The power to borrow money on the credit of the United States was, of course, explicitly granted (Article I, Section 8, Clause 2).

In other words, with the power to repay debts, the national government would be creditworthy, i.e., capable of borrowing new money in the future, provided it also persuaded prospective lenders that it had the political will to do so. In theory, the most creditworthy borrower in the world is a sovereign authority with effective taxing power and the determination to honor its obligations. The framers made such obligations legally binding, and Alexander Hamilton's subsequent financial program set out to convince the world of the new government's absolute determination to repay. Once this principle was firmly established, Hamilton argued, the national government would become a creditworthy engine for future economic development. Its sound credit could then serve to undergird the economic activity of the private economy. Money would have stable value; investment would be encouraged; and prosperity would naturally follow.

Among the taxes the new national government was specifically authorized to lay and collect were duties and imposts on goods being imported into the United States. This grant of power had three significant implications. First, it gave the national government an easy way to collect taxes. Duties or imposts on imported goods are collected directly from the importer or receiving merchant; the consumer is often unaware of the increased cost of the goods. (By contrast, a tax on property is more difficult to enforce and, especially in the early years, more likely to have provoked resistance.)

Second, the power to impose potentially high duties on imports gave the new national government sweeping power to control access to the American market, a power that could be used for various economy-promoting purposes. The central government could protect infant American industries from the competition of foreign goods, or grant greater profitability to favored industries by maintaining their prices at artificially high levels. And it could effectively promote export industries through threatened retaliation against any foreign country that sought to exclude American products from its markets.

Third, when read together with the prohibition against any state's imposing duties or imposts on imports or exports, this grant of power began to establish the United



Saw mill and block house on Fort Ann Creek, N.Y., 1789. Library of Congress.

States government's responsibility for promoting a national market and national prosperity. The states were allowed to lay imposts or duties on imports or exports only if absolutely necessary for purposes of inspection. Even then such laws were subject to the permission and revision of Congress, and any revenues became the property of the U.S. Treasury. In no other part of the Constitution were the states more explicitly, comprehensively, or firmly excluded from an economic role they had formerly enjoyed.

The framers sought to develop the national character of the economic market *and* to establish the national government as its protector and promoter. The famous "commerce clause" (Article I, Section 8, Clause 3) contributed to that goal. Here, the Congress is granted the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes. This broad power, so much the focus of later litigation, was clearly the linchpin of the national economy-to-be. Almost from the beginning, debate arose regarding just how fully this grant of power, by itself, excluded the states from a commerce-regulating role. However, it is quite clear from the "supremacy clause" (Article VI, Clause 2) that, when Congress has acted to regulate commerce, the states cannot act to the contrary.

There has also been much debate over the precise definition of "commerce ... among the several states," and thus over the scope of Congress' power. But there can be no doubt of the framers' intent to give the national government responsibility for maintaining and promoting a national market. Not only were the states excluded from their former practice of taxing imports and exports crossing their borders, but Congress was also required to maintain national uniformity in *its* actions. For example, Congress may not give preference through its commerce or revenue powers to the ports of one state over those of another. Nor can it require ships bound from one state to enter, clear, or pay duties in another (Article I, Section 9, Clause 6). All duties, imposts, and excises, as well as bankruptcy provisions, must be uniform throughout the country (Article I, Section 8, Clauses 1 and 4). For good measure, the Constitution also assures that the citizens of each state shall enjoy the same privileges and immunities as the citizens in other states (Article IV, Section 2, Clause 1), meaning that no state could give preferences in business or other economic opportunities to its own citizens.

No account of the Constitution's commitment to a sound national economy would be complete without inclusion of the prohibition against state laws impairing the ob-

The new Constitution, growing out of concerns with "trade and commerce," reflected the commercial vision of America's future. The commercial interests fought for a vision of a total political economy which they had written into a founding document—and won.

ligations of contract (Article I, Section 10, Clause 1). This provision was aimed at the kind of debtors' demands that resulted in Shays' Rebellion. Article I, Section 10, Clause 1 prevents state "impairment" of any pre-existing contract that might bind participants in the private economy. In other words, once a transaction has resulted in a contract, state governments must respect (and enforce) it. All participants in the private economy (including, of course, creditors) were now able to enforce performance of contracts, without fear that a state might legislate changes in the terms of the obligations involved. This vital intangible property right, so integral to an active commercial economy, was now immune from state legislative attacks, such as mortgage moratoriums, or locally sympathetic juries.

The National Economy's Supporting Political System

By its very nature, a commercial economy depends on opportunities for business growth and profit, the sanctity of contracts, and respect for the intangible property rights that allow gains realized from all these transactions to be retained for the future. All of these require confidence that the national government will maintain order, protect credit, preserve sound money, and enforce rights and contracts. Citizens must retain confidence that courts will function, that written contract terms will prevail, that money will stay sound—if a national commercial economy is to grow and prosper.

On the other hand, for those who live in a relatively self-sufficient farming community and trade mostly with neighbors, whose fortunes depend upon nature, it helps to be able to control the medium of exchange locally. In eighteenth-century American communities, all often agreed to share the burden of hard times by delaying debt collection; foreclosures on property constituted only a very last resort or were prevented by force, if necessary. As the legal historian Morton J. Horwitz pointed out: "The community's sense of fairness was often the dominant standard in contracts cases."

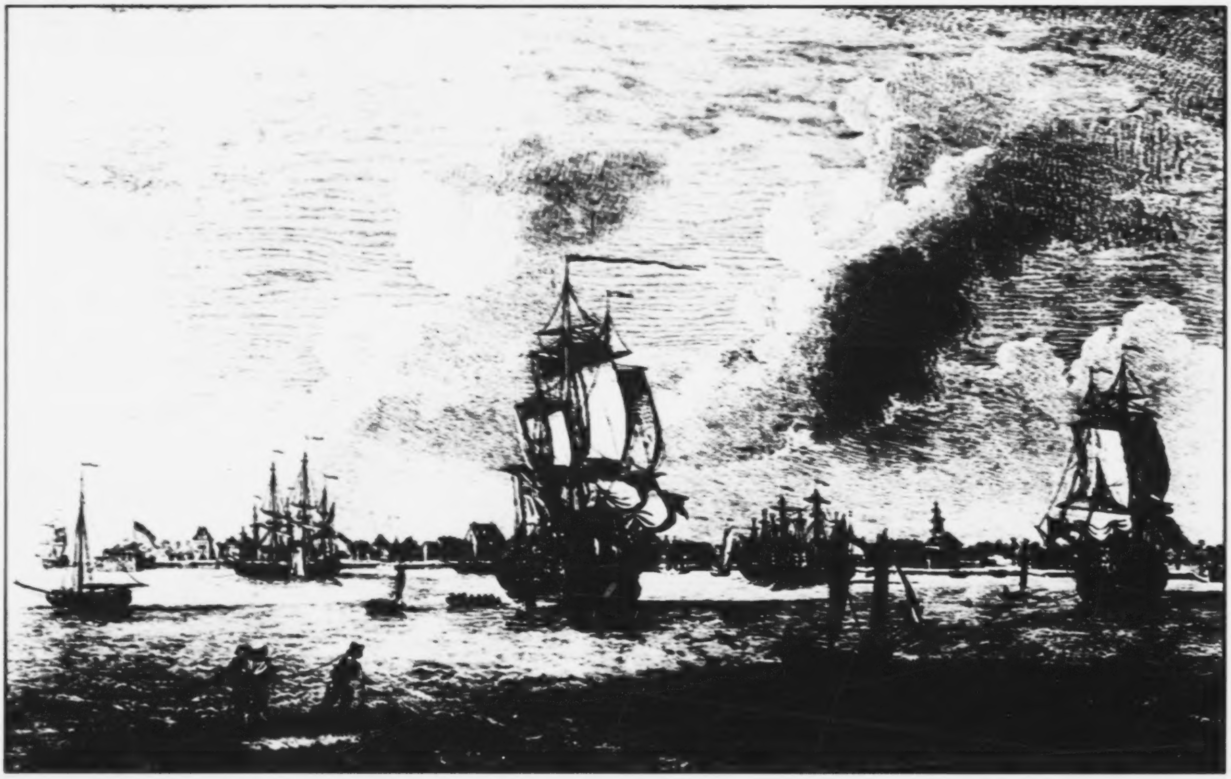
The point is that a populace's preferred version of political structures and practices will *fit* with the manner in which they obtain their livelihood—their economy—and with the values and social principles that they hold. So it was in the founding era. Some Americans—usually farmers—preferred a locally-based and locally-controlled political structure, with a potent legislature. Others preferred a government capable of enforcing a uniform set of laws across the entire territory, with the locus of power nationally oriented and removed from direct popular control. They preferred a strong executive to deal with international affairs and a strong judiciary to enforce property rights and national uniformity. These persons tended to be more cosmopolitan, wealthier, and interested in commercial, manufacturing or financial activities.

And it was the members of this latter group that attended the Philadelphia Convention—not the small farmers unable to leave their land for an extended period of time. Therefore, the Constitution which emerged favored the attending delegates' *vision* of what the United States and its political structures and institutions should be and do. The Constitutional Convention was an eminently *political* activity where (some) members of the public met to discuss and make public choices, choices which were subsequently (but narrowly) ratified by a majority of those who voted on the issue.

In basic structure, the proposed national government was candidly designed to prevent majorities from being able to pass any ill-conceived legislation in the heat of passion or envy, for example, "paper money,... an abolition of debts, an equal division of property," as James Madison enumerated in *The Federalist* No. 10. The framers were generally uneasy about the capacity of groups of people to make rational and "just" decisions. "Democracy" was a thing to be feared.

James Madison's *Federalist* No. 10 contains the classic statement of the problems inherent in allowing the majority to govern. He first states that an unequal acquisition of property is inevitable, as is the propensity of people to form "factions," or groups seeking their own self-interest rather than the public interest. But generally there are two main factions—"those who hold and those who are without property ... those who are creditors, and those who are debtors." Unfortunately, most often those without property and/or the debtors make up the majority of the populace. Therefore, the problem is "to secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government." The solution is a large republic with a government designed to fragment and control the majority.

The extent to which the framers accomplished the control of potential majorities of "have nots" has been described many times—notably the system of separation of powers and checks and balances. But the Constitution, and its subsequent interpretation, added a new means to accomplish this end. In



Charles Town, South Carolina, 1768. Library of Congress.

contrast to the Articles of Confederation, the new Constitution and the laws of the United States applied directly to individuals. Failure to pay taxes, for example, would result in prosecution and conviction in the federal courts. Ultimately enforcement of any unpaid judgments through seizure and sale of property would be by U.S. officers rather than local courts, juries, or sheriffs. A complex national judicial system, composed of federal law, federal courts, and a host of lawyers, could ensure conformity with the requirements of the private commercial economy—a protection of intangible property rights, enforcement of contracts, uniformity of rules. What John Adams called "an empire of Laws" could deftly control a fractious people and preserve order in an apparently neutral and mechanical way.

Although the Constitution nowhere explicitly gives the Supreme Court power to declare acts of Congress void for inconsistency with the Constitution, Hamilton had argued for such power in his famous *Federalist* 78. Chief Justice John Marshall later adopted that argument and fully established this last and most powerful "check" upon the power of the majority. The counterargument, offered by Thomas Jefferson and others (expressed in the case of *Eakin* v. *Raub*, 1825), has been lost, both figuratively and in reality. It ran that, since the people are the founders and expressed their will in the Constitution, it should be the people who decide what the Constitution means. At a minimum, an elective body, the legislature or Congress, should be the deciding voice rather the Supreme Court, an appointive body. The optimum, of course, would be a referendum to the people as a whole.

A Concluding Note

The framers intentionally sought the adoption of a founding document that would support and enhance the emerging national, and international, economy. Without recognition of the framers' overall purposes, today's observer might assume that the current U.S. economy was inevitable, or that our political institutions and practices stand independent of that economy. Neither of these is true. Our economy reflects the framers' goals and choices, and our political institutions their design to implement these choices. But because the Constitution provides mechanisms for change, political economic choices continue to be in fact the responsibility of every generation of Americans.

Suggested additional reading:

Eric Foner, *Tom Paine and Revolutionary America* (1976).

James A. Henretta, *The Evolution of American Society, 1700–1815* (1973).

Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (1977).

Jackson Turner Main, *The Anti-Federalists: Critics of the Constitution* (1961).

Gary B. Nash, *The Urban Crucible: Social Change, Political Consciousness and the Origins of the American Revolution* (1979).

David P. Szatmary, *Shays' Rebellion: The Making of an Agrarian Insurrection* (1980).

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A "New Historical Whopper": Creating the Art of the Constitutional Sesquicentennial

by KARAL ANN MARLING

On August 23, 1935, a Joint Resolution of the Congress charged a special commission with mounting the official celebration of the 150th anniversary of the "birth of the Constitution." The President of the United States was the titular chairman of that body, which included a host of distinguished and busy members from both chambers, and a decorative smattering of private citizens from several more or less remote points in the Union.

Sol Bloom, Czar of the Sesquicentennial

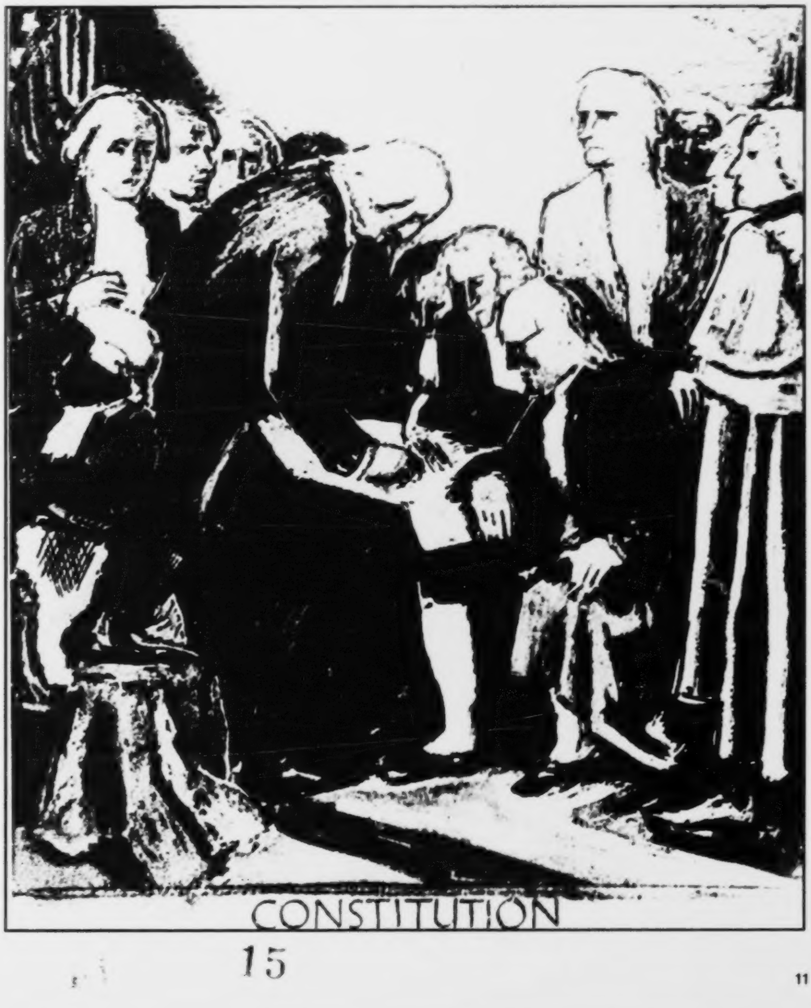
Neither the legislators nor the far-flung representatives of John Q. Public were expected to relish the day-to-day toil of making Americans everywhere "Constitution-conscious," of course. So it came as no surprise to Washington insiders when Franklin D. Roosevelt promptly named Rep. Sol Bloom of New York Director-General and de facto czar of the United States Constitution Sesquicentennial Commission. The indefatigable Mr. Bloom, a former showman, songwriter, movie-palace magnate, and Ferris-Wheel promoter, had just closed the books on his wildly successful national observance of the bicentennial of George Washington's birth, a public relations triumph that elicited this accolade, by wire, from Will Rogers:

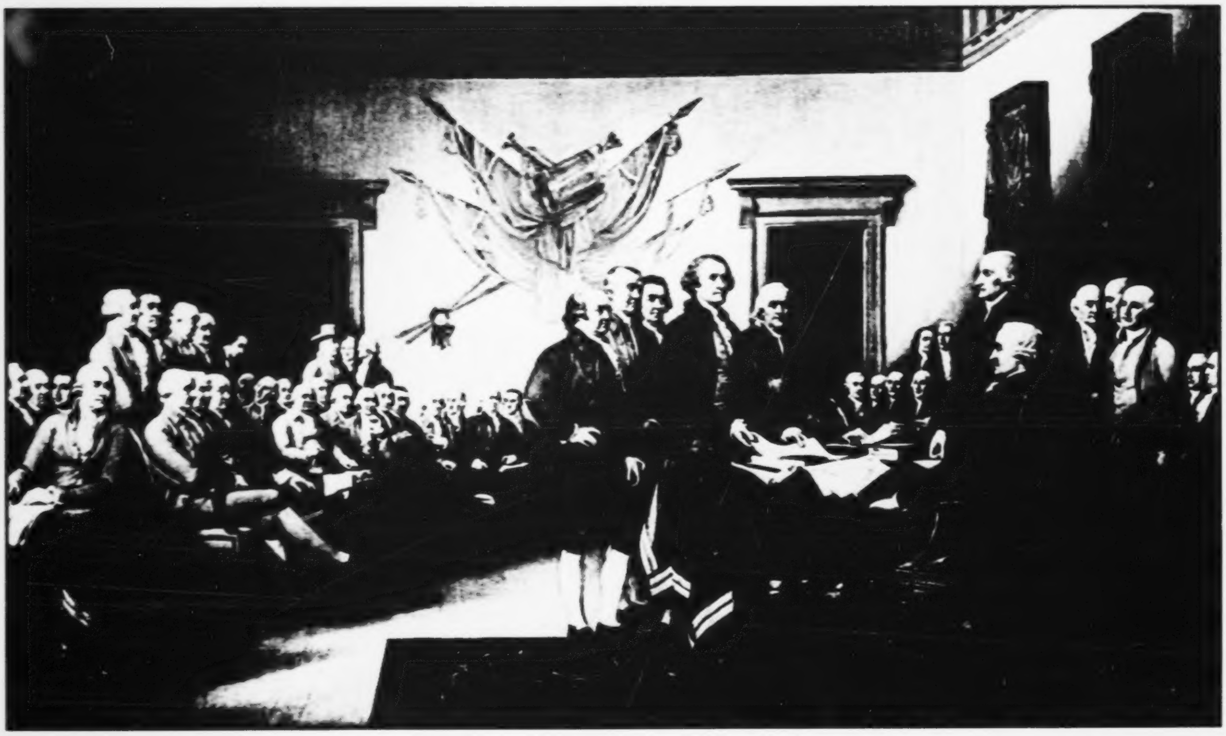
> YOU ARE THE ONLY GUY EVER MADE A PARTY RUN NINE MONTHS, AND YOU DID IT IN DRY TIMES TOO. SOL YOU MADE THIS WHOLE COUNTRY WASHINGTON CONSCIOUS....

Despite such votes of confidence, the ebullient Bloom embarked upon his new commemorative chore with uncharacteristic trepidation. He was worried about the length of the anniversary period, slated to run from the spring of 1937 (delegates had met to revise the Articles of Confederation in May, 1787) through the spring of 1939 (Washington took the oath of office as president under the new Constitution on April 30, 1789). But what troubled him even more was the seemingly abstract, impersonal character of the events to be recalled to the national mind.

George Washington, albeit a little starchy for the tastes of the 1930s, was still a man who could be and often was pictured in concrete detail—standing up in a rowboat on a stormy night, or brandishing a hatchet. In 1932, in fact, Bloom had wisely concentrated on the human image of the Father of His Country, until no sentient American could enter a public building, go to school, attend a lodge meeting, mail a letter, or open a newspaper with-

Study for Constitution *mural panel in Justice Department Building by Boardman Robinson, from Edward Bruce and Forbes Watson,* Art in Federal Buildings *(1936). Courtesy Karal Ann Marling.*





The Declaration of Independence **by John Trumbull in the U.S. Capitol Rotunda. Art Collection of the Architect of the Capitol.**

out meditating on the personhood of the First President: his picture was everywhere—on posters, stamps, ads, booklets, calendars from the butcher, and all manner of patriotic bric-a-brac. But now, Bloom lamented, "I had a document to work with instead of a man."

Congressman Bloom's predicament, as head of the Constitution Sesquicentennial Commission, was to find a way to give pictorial life to the words, ideas, and invisible aspirations of the human heart that reposed in the Constitution. In doing so, he chose to ignore the dynamic constitutional issues that occupied the political observers of the day—the constitutionality of the New Deal legislation, the scope of national power—and to focus instead on the enduring, indeed transcendant, nature of the document. Using the Bicentennial of Washington's birth as a model, Bloom once again chose an heroic approach, but one that encompassed every American.

On September 17, 1937, when Sol Bloom kicked off the festivities with a speech before the Shrine of the Constitution in the Library of Congress, the problem of visualization was uppermost in his mind. And so in his address he humanized the document with a vivid word-picture of the signatories, inching gravely forward one by one, to bend over the self-same sheet of parchment on which their names could still be read:

> I see Benjamin Franklin, somewhat bowed with age, his keen eyes twinkling behind enormous spectacles. He is chatting with a younger man of fresh complexion and handsome features—Alexander Hamilton, of New York.... A small, shy gentleman in black advances. He and General Washington exchange nods of friendly courtesy, and I see this gentleman sign his name—James Madison, Jr. Madison, the most industrious and resourceful deputy of all, the genius of statecraft and persuasiveness who wove into one fabric so many conflicting opinions. So they come forward—informally, chatting, smiling, with the air of men who are relieved of a tremendous burden of labor and responsibility.... In due time Washington brings the gavel down and dissolves the convention.

Although the Director-General would justify the pictorial nature of his remarks on the basis of instructions from his board members—the imagery, he wrote, was "in line with the commission's plan to tell the story in terms of the men who had done the work"—it is clear that the style of the Constitutional fete was borrowed in toto from the earlier Washington bicentary, the publicity campaign for which had opened with a much-ballyhooed search after an "absolutely authentic" portrait of the Father of His Country to be emblazoned upon those millions of posters and stamps. After the 1932 celebration, Bloom and his staff had come to treat all history as biography, framed in the dramatic mold of a rags-to-riches story in a magazine or an epic of the silver screen, like *Alexander Hamilton* (1931), with Alan Mowbray in the role of Washington. Concepts and events thus became portraits, a habit that carried over into the planning for the observances of 1937 and 1938. Beyond simple inertia, however, there were also sound aesthetic and ideological reasons for Bloom's anxiety to treat the Constitution in meaningful pictorial terms.

The Search for a Picture

The artistic issue was complicated by the distinctly unpicturesque scenes called to mind by the long

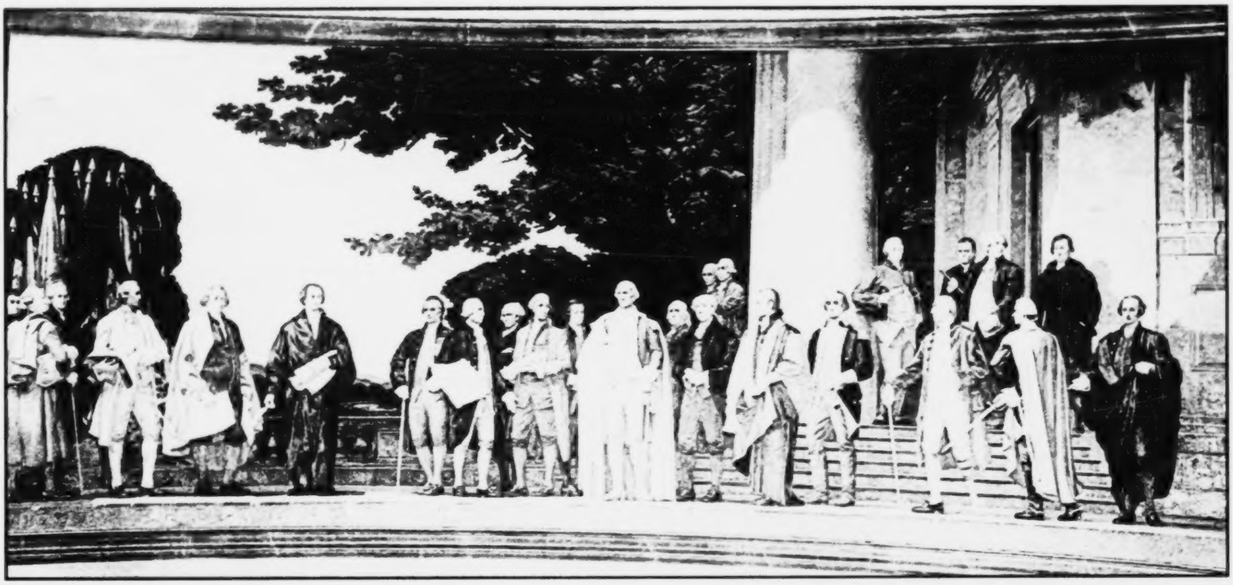
Great men had average qualities, writ large; but Everyman . . . also harbored the seeds of greatness.

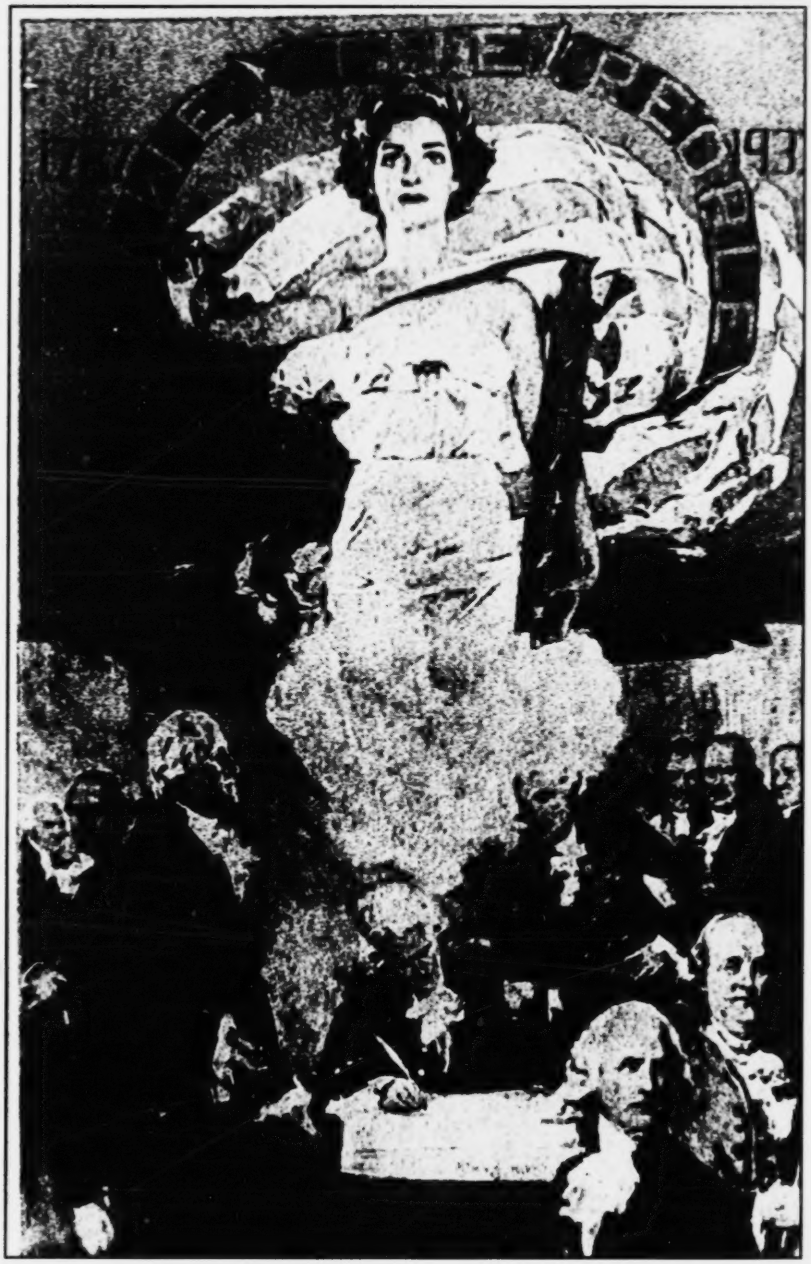
string of peaceable meetings, assemblies, and conventions whereby Americans got themselves a Constitution in the first place. Indeed, some of the proudest artistic talents of the young republic had been humbled by the task of making a large group of bewigged colonial gentleman, sitting or standing about a large chamber, seem in the least interesting to the onlooker. John Trumbull's valiant attempt to bring a sense of moment and lasting significance to the framing of "The Declaration of Independence" in his mural in the Capitol Rotunda (1786-97) is a case in point. His Revolutionary War scenes fairly crackle with the energy of sweeping diagonals: the din and confusion of battle are mirrored in the patterns of light and darkness that play across the surface of his canvases. But here the tall, red-haired Jefferson, with the stubby Adams at his elbow, depositing his draft of the document on Hancock's table is simply not tall or colorful or different enough, in this conclave of his peers, to command much attention, despite the trophy of flags mounted on the wall just above his head. As for the rest of the forty-seven gentlemen included, they line themselves up in even, featureless rows compelling only to antiquarians with magnifying glasses.

At best, Trumbull's composition itself bespeaks a certain orderliness, a visual parity among its own constituent elements that might suggest eighteenth-century reason, the rule of law, and the equality of free men ruled by law, notions potentially useful to the painter of Constitutional histories in 1937. But thoughts of the Declaration of Independence (or the Constitution!) are not inherent to such arrangements of form: the viewer must recognize the scene and know a good deal about the particular parchment being brandished, signed, or laid quietly upon a table before those independent rhythms of line and shape assume much significance. The educational value of composition in general, and of the "conclave" picture in particular, therefore, left much to be desired, as the Constitution Sesquicentennial Commission would shortly learn from an irate public.

Bloom's hunt for Washington pictures had turned up a series of nineteenth-century biographical potboilers by Junius Brutus Stearns. On September 17, 1937, even as Congressman Bloom was gazing, in his mind's eye, at the Founding Fathers solemnly reassembled to sign the Constitution anew, the post office was issuing a three-cent stamp of a blinding magenta hue adorned with the fifth of the Stearns paintings (meant to illustrate "George Washington, the Statesman"), a work called "Signing of the Constitution in Philadelphia Convention." That title appeared on the face of the stamp in "micro-

***Madison Submits the Constitution to Washington and the Convention* by Barry Faulkner.**





Cover of **The Story of the Constitution** *by Sol Bloom (1937), with the official poster by Howard Chandler Christy.*

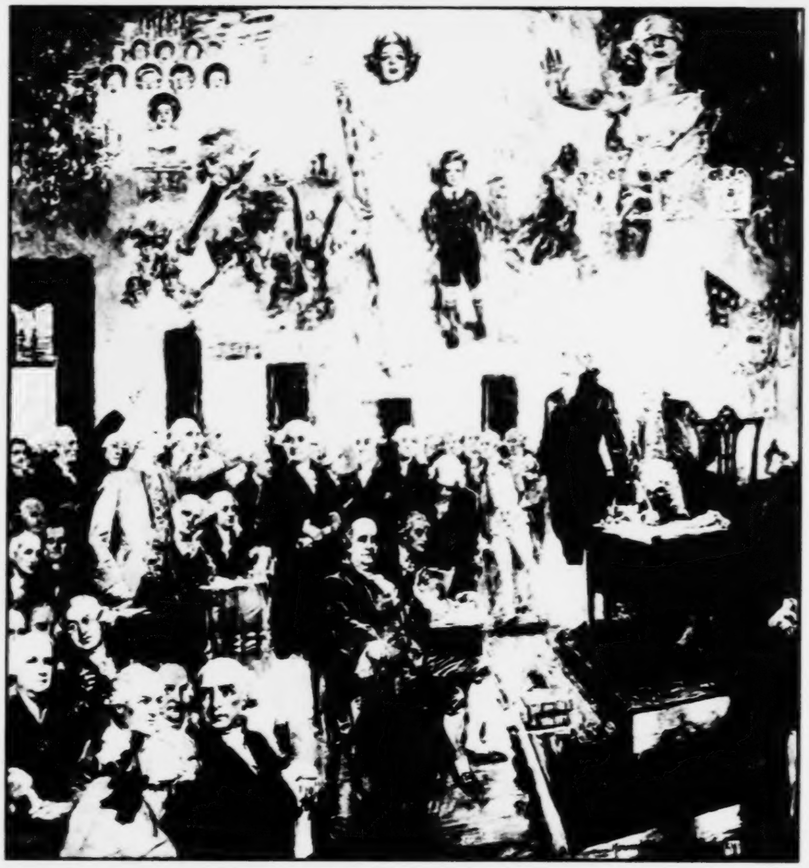
scopic inscription," and, according to an indignant editorial in the *Philadelphia Inquirer*, it was a lucky thing the name was there!

> Such explanation is highly necessary, since the 39 masculine figures whom the artist has seen fit to crowd into a space less than an inch and a half wide and seven eighths of an inch deep might be doing anything, from signing the Constitution to singing the Star Spangled Banner in chorus.

The offending image was, in due course, withdrawn from sale, but the skirmish alerted Congressman Bloom to the deplorable fact that in all of Washington, D.C., there seemed to be but one single, extant painting depicting the signing of the Constitution! Indeed, if J.B. Stearns' historical tableau was numbered among such works, there were only six quasi-memorable renderings of the theme in all of the United States, and those by such minor stars in the painterly firmament as Thomas P. Rossiter, Albert Herter, Joseph Boggs Beale, John E. Froehlich, and Barry Faulkner.

The latter's pair of murals in the rotunda of the new National Archives building, representing the Declaration and the Constitution, had been unveiled, late in 1936, to almost universal indifference. Although he had avoided the all-lined-up-for-the-class-picture tedium of his predecessor's efforts by spreading his dramatis personae at random in a sort of classicized pastoral setting full of lofty columns and leafy trees, in the process Faulkner sacrificed the story he was telling to compositional variety. Those few lovers of art (or the Constitution) who ventured up Pennsylvania Avenue for a look at the pictures went away, like one of Bloom's roving deputies, convinced that Mr. Faulkner "must have been reading Roman history and not American history." Even the free souvenir penny-banks dispensed to visiting schoolchildren by American Can Company to mark the occasion went begging.

Had Bloom's minions searched long and hard enough around the neighborhood of the Federal Triangle, they might also have discovered a sculptural frieze by Paul Jennewein, entitled Constitution 1789, tucked away in the entrance vestibule of the new Justice Department building on Constitution Avenue. They might have found the sketches for a mural-in-progress on the same subject by Boardman Robinson, a panel slated to be part of the vast, decorative program winding up the main stairhall of the same building, tracing the history of jurisprudence from Menes and Moses to Justice Holmes. In both Jennewein's and Robinson's renditions of the theme, the informed observer, it is true, could probably pick out Washington and Franklin if he or she looked for them, but the generic quality of the images as a whole—identified mainly by their



We the People. *Sesquicentennial painting by Howard Chandler Christy.*

coats and wigs, the participants all look very much alike—tacitly admitted that the scene was a visual cliché, an emblem nobody was expected to examine closely, in order to spot William Few of Georgia, or Richard Dobbs Spaight, of North Carolina, in a characteristic pose.

That indifferent attitude—the sense that history was safely over and done with, that it could be reduced to a few, ritualized symbols trotted out briefly on national anniversaries—was unacceptable to a fellow who had devoted years of his life to making George Washington "live again, in the hearts and minds of his countrymen," and whose preparations to revive interest in the Constitution included a painstaking effort to locate and publish "entirely authenticated" portraits of the fifty-odd worthies in knee britches involved in framing and ratifying the document. Sol Bloom was both puzzled and affronted by the apparent shortage of pictorial homages to America's Constitution, and by the ho-hum treatment the subject seemed to invite. But he was also predisposed to see a remedy for this artistic failure in the rhetoric of "the common man," the little guy, the American individual.

Bloom had first been elevated to his position as the nation's master of ceremonies on commissions created by Coolidge and Hoover. Yet his approach to the business of commemorating proved equally servicable to the Roosevelt administration because, whatever the considerable political differences between the New Deal and the preceding Republican administrations, it can be argued that a thread of fascination with the uniqueness of every citizen runs without interruption through American culture during the years between the wars. In the twenties, for instance, a distinct kind of celebrity stood in for the average American who, with a little luck and a boyish modesty, could probably have flown to Paris solo with a packet of homemade sandwiches tucked under one arm. Or so Lindy's feat was described at the time. Likewise, the average Joe of middle years, spreading girth, and a taste for a beer, found it hard to resist identifying with the doings of Babe Ruth: there, but for a long ball and a pin-striped uniform, went most of the Bambino's fans! In the thirties, the suffering poor captured on film by government photographers as they tramped along dusty highways in flight from their own joblessness were brothers—"Brother, Can Ya Spare a Dime?"—to the anxious breadwinners who looked at those pictures in the magazines, and trembled.

Great men had average qualities, writ large; but Everyman, as the novels of Steinbeck and Dos Passos so movingly demonstrated, also harbored the seeds of greatness. The point of the kind of once-upon-a-time trivia Bloom's commissions delighted in preserving and dispensing was to supply historical lives with the same kind of detail and texture the real lives chronicled in those magazines had. ("Who were the oldest and youngest members of the Constitutional Convention?" reads a typical Bloomian query. The answer: "Benjamin Franklin, of Pennsylvania, then 81; and Jonathan Dayton, of New Jersey, 26.") And the point of Sol Bloom's several million Washington pictures, along with his growing roster of "signer portraits," was to convince the average citizen that a sturdy bond of kinship existed between himself and the luminaries of the past, with their big noses, receeding hairlines, beady eyes, and other all-too-human marks of a common humanity.

Howard Chandler Christy

In 1932, Bloom had turned to Norman Rockwell and other famous illustrators of the day, popular artists known for precisely that common touch, in order to "sell" the notion of the relevance of historical personages—and to a much lesser extent, of historical events—to the affairs of the present day. In 1937, faced with the seemingly impossible chore of selling a dusty document to the same customers, Bloom turned again to an illustrator whose stock-in-trade was giving the most unpromising products a personal appeal. Thus it was that Howard Chandler Christy, designer of the celebrated "Uncle Sam Wants You" recruiting poster of World War I fame, became the unofficial "official" painter of the Constitution Sesquicentennial Commission. In that capacity, Christy contributed to the cause the design for a poster called "We, the People" based on a large painting of the same name from which, when it was—inevitably—reproduced in the public arena, the creator derived considerable income.

The lower half of the composition roughly followed previous depictions of the assemblage in Philadelphia's State House, but the upper and far more prominent half of the picture featured one of the artist's patented "Christy Girls," got up in a kind of evening gown of gauzy stuff, and perched leadenly on the outstretched wings of the American eagle, suggesting some patriotic principle, but one obscured rather than clarified by her multiple attributes. "Liberty" often wears such a costume, for example, but so do emblematic figures of "Charity," "The American Continent," and even "Alma Mater" on occasion. She wears a laurel wreath upon her head, like "Victory" or "Truth." But she carries the Roman fasces, the unmistakable symbol for "e pluribus unum" and so, perhaps, she is a new allegory of "The People"—the maternal origin of the American nation, kindly, victorious, and free.

In the poster version, at any rate, backed by a billowing flag, she hovers like some legless apparition from a patriot's dream, just above the heads of a select group of Founding Fathers who contrive manfully to ignore her. In the painted version, published in the *New York Times* and elsewhere, she is accompanied by a troop of subsidiary attendants, including a wafting Boy Scout. But both versions of "We, the People" forceably bridge the gap between past and present by the palpable, even contemporary character of a girl who most often appeared as a lifeless stone goddess on the steps of some library. Instead, she is an all-American girl of 1937, with lipstick and marcelled hair, and a figure that would do a bathing beauty proud. She is, indeed, what being a citizen of a constitutional republic—one of "The People"—might well mean to the average American fellow, walking on a beach on a sunny Saturday, free as a bird, with the wind in his hair, and pretty girls everywhere. As she reaches forward out of Christy's poster toward that sunny realm outside the picture, the spectator must wonder how the old gentlemen in the wigs have failed to notice her vibrant being!

If Franklin, Madison, and Daniel Carroll seem oblivious to the lady, they are, however, far from indiffer-

Statue of George Washington by James Earle Fraser at the 1939 World's Fair. Collection of Karal Ann Marling.

The Constitution meant the free interaction of historical personages with modern-day Americans whose lives their thoughts and actions had influenced and would, it seemed, shape for all time to come.

ent to the world of their descendants. Lost in thought, the Washington of "We, the People" presents his noble profile indifferently to the viewer, but most of his confreres peer out with a fierce intensity at Sol Bloom, Mr. Christy, and the crowds of average Americans prone to hurry past such posters on their daily rounds. The lively interest of history in the doings of the rising generation, rather than the almost *too* humanized prettiness of the Christy Girl, was the artist's ultimate solution to the problem Bloom set for art in the service of the Constitutional Sesquicentennial. The world of the 1787 had become pictorially as one with the world of 1937.

As a reward for his services, Christy was, in 1939, given a $30,000 commission—the contract bypassed all the usual competitive procedures—to translate his poster into a gigantic, 20- by 30-foot picture of the Signing of the United States Constitution destined for the Grand Stairway of Capitol's lower chamber. *Time*, in a snide commentary on the 1941 dedication, repeatedly noted the size of the "new historical whopper," as if the scale alone warranted attention. But the biggest thing about Christy's canvas was, in truth, its overweening ambition to make the affairs of the eighteenth century relevant to the twentieth by focussing the thrust of the action not upon the act of signing but on the reactions of the modern-day witness to that event, the viewer toward whom the majority of the painted founders glance, turn, or gesture. The past, then, acts as witness and inspiration for the American future, in a conceit also writ large upon the plans for the 1939 New York World's Fair.

Dazzled by the sleek modernity of the Trylon and Perisphere that loomed above Flushing Meadow, contemporary critics and present-day historians alike have doubted the sincerity of the business interests who mounted the '39 Fair ostensibly to honor the Constitutional Sesquicentennial, and specifically the inauguration of George Washington in New York City on April 30, 1789. And yet, under the relentless prodding of Bloom and his Commission, Washington was a significant presence amid the glimpses of a utopian tomorrow provided by the General Motors' "Futurama," the suburbanized "Democracity" of the 1960s tucked away inside the Perisphere, and the Westinghouse pavilion, where "Elektro" the Robot and his mechanical dog predicted the shape of the world to come. Souvenir vendors, for instance, did a brisk trade in china pitchers made in the streamlined likeness of Washington's head. Commemorative medals issued for the occasion featured the inauguration on one side and the geometric modernism of the Theme Center on the other, as if to assert that America's yesterdays ensured the glories of her tomorrow. And at night, with the red, white, and blue bands of the flag projected upon its surface, the skin of the Perisphere often served as a dramatic background for the gleaming white 65-foot statue of Washington by James Earle Fraser that was the principal decorative feature of the mile-long Constitution Mall at the heart of the fairgrounds. There, too, lay the symbolic message of the World's Fair, proclaimed by the massive emblems anchoring the ends of a ceremonial plaza named in honor of the Constitution. On one side stood the twin symbols of American progress and promise. On the other loomed the massive Washington, his cloak swept back, his hat in hand, one foot poised expectantly over the edge of his pedestal, gazing intently toward that future, as though he were about to step out of history into the fairgoing world of 1939, and thunder off down the Mall in pursuit of his nation's destiny, with his latter-day descendants at his heels.

The Constitution, to Sol Bloom and others who honored its genesis in art in the 1930s, meant the free interaction of historical personages with modern-day Americans whose lives their thoughts and actions had influenced and would, it seemed, shape for all time to come. It meant an aesthetic marked by a certain pictorial dynamism: Washington's quivering foot and the sharp glances of Christy's signers contrast dramatically with the stasis of earlier renderings of constitutional history. Those glances, those twitchings and stirrings, meant that the Constitution was still an active force in the world of Sesquicentennial America. As for the framers and signers, the Founding Fathers—why they looked a lot like that big man in a hurry, a big guy with a dream of the future. They looked, in short, a lot like the average American in 1939.

Suggested additional reading:

Sol Bloom, *The Story of the Constitution* (1937; rep. 1986).

Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (1986).

Karal Ann Marling is professor of American studies and art history at the University of Minnesota. Among her recent books are *Wall-to-Wall America: A Cultural History of Post-Office Murals in the Great Depression* (1982), and *The Colossus of Roads, Myth and Symbol Along the American Highway* (1984). Her study of George Washington iconography in the twentieth century is forthcoming from Harvard University Press. Professor Marling in 1985 was the Louise Crowninshield Fellow at the Winterthur Museum.

A Parley

The Founding Fathers and the Right to Bear Arms: To Keep the People Duly Armed

by ROBERT E. SHALHOPE

Over the past quarter-century, Americans have grown increasingly concerned about the private possession and use of firearms. Their differences, which range from polite public forums to tragic confrontations between individual citizens and the police, find both sides arrayed behind differing interpretations of the Second Amendment. Citizens anxious to protect the individual's right to possess firearms stress the "right to bear arms" portion of the amendment. But those concerned with collective rights and communal responsibilities emphasize the "well regulated Militia" phrase in their attempt to gain restrictive gun legislation. Each group rests its case upon an appeal to history. In fact, quite frequently both sides draw upon the same historical data to support opposing views.

Unfortunately, in their efforts to promote disparate views, these polemicists have obscured the historical context within which the Second Amendment originated. To grasp the meaning of the Amendment, as well as the beliefs of its authors, it is necessary to understand the intellectual environment of late eighteenth-century America. Attitudes toward an armed citizenry in that time were rooted in an American perception of republicanism which drew primarily upon English models. This belief system joined the twin themes of personal right and communal responsibility. In it, the collective right to bear arms was not opposed to that of the individual, but included it; indeed, it was deduced from it. It is this integration of the individual and the community that has escaped modern antagonists but that is so essential to understanding the Second Amendment and the role of the armed citizen in the early republic.

Regarding the place of arms within their society in the late eighteenth-century, Americans firmly believed in two distinct principles: individuals had the right to possess arms to defend themselves and their property; and states retained the right to maintain militias composed of these individually-armed citizens. While committed to both of these rights, Americans clearly differentiated between the individual right to possess arms and the communal responsibilities of state militias. During the unrest in Boston in 1769, for example, the author of "A Journal of the Times" attacked the "licentious and outrageous behavior" of the British military in the city and then exclaimed: "It is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression."

That American citizens firmly believed in the right of the private citizen to be armed in his own defense became quite clear in petitions to the Massachusetts legislature resulting from the Massachusetts Declaration of Rights of 1780. That document claimed that the people had a "right of enjoying and defending their lives and liberties" (Article I) and "to keep and to bear arms for the common defence." (Article XVII). This wording caused a number of towns to demand more precise language regarding the right to bear arms. The citizens of Northampton, for example, resolved:

> We also judge that the people's right to keep and bear arms, declared in the seventeenth article of the same declaration is not expressed with that ample and manly openness and attitude which the importance of the right merits; and therefore propose that it should run in this or some such like manner, to wit, The people have a right to keep and bear arms as well for their own as the common defence. Which mode of expression we are of opinion would harmonize much better with the first article than the form of expression used in the said seventeenth article.

Thomas Jefferson did not even mention the militia in his initial draft of a proposed constitution for the State of Virginia. He did, however, oppose standing armies except in time of actual war. Then, in a separate phrase, he wrote: "No freeman shall ever be debarred the use of arms." In succeeding drafts he amended this statement to read: "No freeman shall be debarred the use of arms within his own lands or tenements." Clearly, Jefferson believed that the possession of arms could be entirely unrelated to service in the militia. During the debate over ratification of the United States Constitution in 1788, Samuel Adams offered an amendment in his state's convention that read: "And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press . . . or to prevent the people of the United States who are peaceable citizens from keeping their own arms."

When James Madison and his colleagues wrote the Bill of Rights they did so at a time when Americans felt strongly about protecting individual rights from a potentially dangerous central government. In fact, Madison suggested these provisions be inserted directly into the body of the Constitution in Article I, section nine, between clauses three and four. He did not separate the right to bear arms from the others designed to protect the individual; he did not suggest placing it in

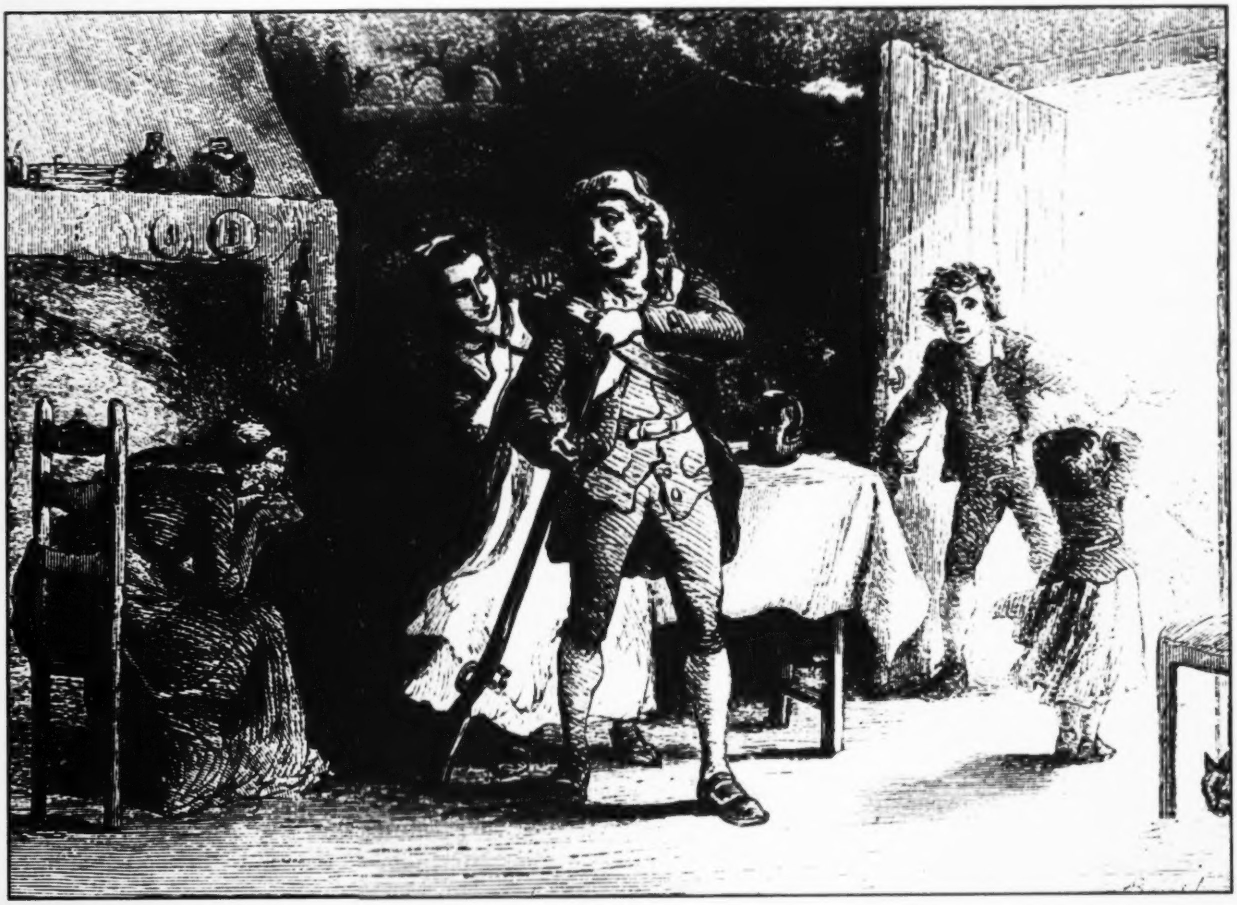
Madison and his colleagues intended the right to bear arms, like that of free speech or a free press, to be a guarantee for every individual citizen whether or not he served as part of the militia.

section eight, clauses fifteen and sixteen, which dealt specifically with arming and organizing the militia. When he prepared notes for an address supporting the amendments, Madison reminded himself: "They relate first to private rights." And when he consulted with Edmund Pendleton, he emphasized that "amendments may be employed to quiet the fears of many by supplying those further guards for private rights."

Others assumed this same stance. Madison's confidant, Joseph Jones, believed the proposed articles "are calculated to secure the personal rights of the people so far as declarations on paper can effect the purpose." Tench Coxe, writing as "A Pennsylvanian," discussed individual guarantees and then, in reference to the Second Amendment, maintained that "the people are confirmed by the next article in their right to keep and bear their private arms." Clearly, then, Madison and his colleagues intended the right to bear arms, like that of free speech or a free press, to be a guarantee for every individual citizen whether or not he served as part of the militia.

While late eighteenth and early nineteenth-century Americans distinguished between the individual's right to *possess* arms and the need for a militia in which to *bear* them, more often than not they considered these rights inseparable. They thoroughly integrated the individual and the community. Observations by Madison, Yale University president Timothy Dwight, and Supreme Court Justice Joseph Story

A minute man preparing for war. Library of Congress.



provide excellent insight into why it was so natural to combine these two rights into a single amendment.

Madison observed, of the oppressed Europeans, that "it is not certain that with this aid alone [possession of arms], they would not be able to shake off their yokes." Something beyond individual possession of weapons was necessary: "But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force; and of officers appointed out of the militia, by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned, in spite of the legions which surround it." Writing early in the nineteenth century, Dwight celebrated the right of individuals to possess arms as the hallmark of a democratic society. Then, he concluded: "The difficulty here has been to persuade the citizens to keep arms, not to prevent them from being employed for violent purposes."

This same lament coursed through the observation of Story, whose *Commentaries on the Constitution of the United States* in 1833 summed up the relationship between armed citizens and the militia as clearly as it was ever stated. In his discussion of the Second Amendment, Story claimed that the "right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic." And yet, even "though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations." Then Story expressed his central concern: "How it is practicable to keep the people duly armed without some organization, it is difficult to see."

Such observations divulge a fascinating relationship between the armed citizen and the militia. Clearly, these men believed that the perpetuation of a republican spirit and character within their society depended upon the freeman's possession of arms as well as his ability and willingness to defend both himself and his society. This constituted the bedrock, the "palladium," of republican liberty. However, the militia remained equally important to them, because militia laws insured that American citizens would remain armed, and consequently retain their vigorous republican character.

Beyond that, the militia provided the vehicle whereby the collective force of individually-armed citizens might become most effectively manifest. By consolidating the power of individual Americans, the militia forced those in power to respect the liberties of the people and minimized the need for professional armies, the greatest danger a republican society could face. This belief lay behind Jefferson's oft-quoted statement: "What country can preserve it's [*sic*] liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance. Let them take arms." Thus the armed citizen and the militia existed as distinct, yet dynamically interrelated elements within American thought; it was perfectly reasonable to provide for both within the same amendment to the Constitution.

In the nearly two hundred years since the ratification of the Bill of Rights, American society has undergone great transformations. As a consequence the number of people enjoying expanded civic rights and responsibilities, including the ownership of firearms, which Jefferson and others felt should be restricted to "freemen," has vastly increased. This created no problem for jurists throughout the nineteenth century: leading constitutional scholars firmly upheld the individual's right to possess private arms. Writing in 1829, William Rawle exclaimed: "The corollary, from the first position, is, that *the right of the people to keep and bear arms shall not be infringed.* The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to Congress a power to disarm the people." Fifty years later Thomas M. Cooley observed: "It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose."

Today, however, there is no such unanimity. Indeed, a great many people question the relevancy of the armed citizen to late twentieth-century life. This is a question that the American people—through the Supreme Court, their state legislatures, and Congress—will have to decide.

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The Founding Fathers and the Right to Bear Arms: A Well-Regulated Militia

by LAWRENCE DELBERT CRESS

Good governments, wrote Niccolo Machiavelli in the sixteenth century, relied for their security on the militia—land owning, voting civilians trained in peacetime to meet the demands of war. Professional soldiers, lacking a commitment to the common good, easily became the agents of ambitious and self-interested politicians. Freedom coexisted with military might only where those with a stake in society accepted military service as a responsibility of citizenship. Some 250 years later, the people of the United States incorporated the essence of the great Florentine's ideas into the language of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

An understanding of the Second Amendment begins with the recognition that America's revolutionary generation—intellectual heirs of Machiavelli—considered bearing arms a collective rather than an individual right. A free people had the right to maintain a militia, but no individual had an inherent right to arm himself for his personal protection. In the hands of individuals, arms produced turmoil, chaos, even anarchy. A disciplined militia, composed of enfranchised property owners committed to the common good, guaranteed liberty and ensured freedom. It deterred foreign aggressors, preserved domestic order, and resisted ambitious rulers. A vital militia also eliminated the need for a potentially oppressive professional army. Like universal manhood suffrage, the right of the individual to arm had few advocates in late eighteenth-century America. The Second Amendment guaranteed only that the militia not be disarmed.

The historical and constitutional context out of which the Second Amendment grew supports that conclusion. During the turbulent decades of the 1760s and 1770s, American colonists turned to the militia—as had Machiavelli and a host of seventeenth- and eighteenth-century republican theorists—to guarantee liberties against the abuses of George III and Parliament. In the winter and spring of 1774–1775, colonists gathered at county assemblies and provincial conventions to condemn the return of British soldiers to Boston and to resolve—in language that foreshadowed the Second Amendment—"that a well-regulated Militia, composed of the gentlemen, freeholders, and other freemen, is the natural strength and only stable security of a free Government." At the same time, the Continental Congress urged provincial assemblies to "disarm all such as will not defend the American rights by arms."

The new state constitutions written as royal authority crumbled in the colonies also identified the militia as essential for the preservation of liberty. Virginia's declaration of rights—adopted almost a month before the American colonies officially announced their independence—set the pattern. Article 13, drafted by George Mason and approved by a committee that included James Madison, declared "That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State." Two months later, Pennsylvania declared that "the people have a right to bear arms for the defence of themselves and the state." The language was slightly different, but the meaning was the same. The body politic, "the people," had the right to protect itself if constituted authority failed to serve the common good. At the same time, free men had a right, even a responsibility, to defend the legally constituted authority vested in the "state." The vehicle for doing both was the militia.

Delaware, Maryland, and North Carolina adopted similar declarations during the first year of independence, the first two states by borrowing language from Virginia's article 13 and the last following Pennsylvania's lead by declaring that "the people have a right to bear arms, for the defence of the State." Vermont, though not formally a state until 1792, quoted Pennsylvania's article 13 in its 1777 declaration of rights. During the same year, New York proclaimed in the body of its constitution the armed militia's importance to the success of republican government. In Massachusetts, John Adams drafted the bill of rights that was ratified with the 1780 constitution. "The people," he wrote, "have a right to keep and bear arms for the common defence." New Hampshire's 1783 bill of rights made the same point, declaring "A well regulated militia is the proper, natural, and sure defence of a state."

The same issues carried over into the debate about the new federal Constitution. Mason's efforts to amend the Constitution provides a convenient summary of the sentiment that led to the drafting of the Second Amendment. Mason, having failed to persuade the Constitutional Convention to adopt a separate bill of rights, sought to include a statement of the militia's importance to a free society in the body of the Constitution. He urged that the congressional power to arm, organize, and discipline the militia be prefaced by a clause identifying that prerogative as intended to secure "the liberties of the people ... against the danger of standing armies in time of peace." Madison, who would later draft the Second

An understanding of the Second Amendment begins with the recognition that America's revolutionary generation . . . considered bearing arms a collective rather than an individual right.

Amendment, supported the measure, but the convention rejected the proposal. Mason subsequently declined to endorse the Constitution. Later, on the eve of Virginia's ratification convention, he joined other Anti-Federalists in an effort to graft the essence of the Commonwealth's article 13 to the new Constitution. Declaring that the "people have a Right to keep & bear Arms," the proposed amendment called "a well regulated Militia the proper natural and safe Defence of a free State." Mason said nothing about the Constitution's failure to guarantee the right of individuals to arm. For him, the issue was an armed militia. "Why," he asked during his state's ratification convention, "should we not provide against the danger of having our militia, our real and natural strength, destroyed?"

The amendments proposed by state ratifying conventions also reflect a determination to incorporate into the new Constitution many of the principles already embodied in existing declarations of rights. Virginia's proposed amendments, which most directly influenced Madison's draft of the Bill of Rights, are illustrative. Declaring that "the people have a right to keep and bear arms," Virginians asked for constitutional recognition of the principle that "a well regulated militia, composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state." That proposition addressed the fear that the new government might disarm the citizenry while raising an oppressive professional army. To reinforce the point, the convention urged that the Constitution declare that standing armies "are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit." A separate amendment urged "that any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead." At no time did anyone express concern about the right of individuals to arm themselves for private purposes.

Madison had Virginia's recommendations in mind when, on June 8, 1789, he proposed to Congress that the Constitution be amended to provide that "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms should be compelled to render military service in person." Reacting to the widely held fear that Congress' access to the militia might be misused, the Virginia representative proposed that the amendment be placed alongside the other limitations on legislative power listed in Article 1, Section 9, of the Constitution.

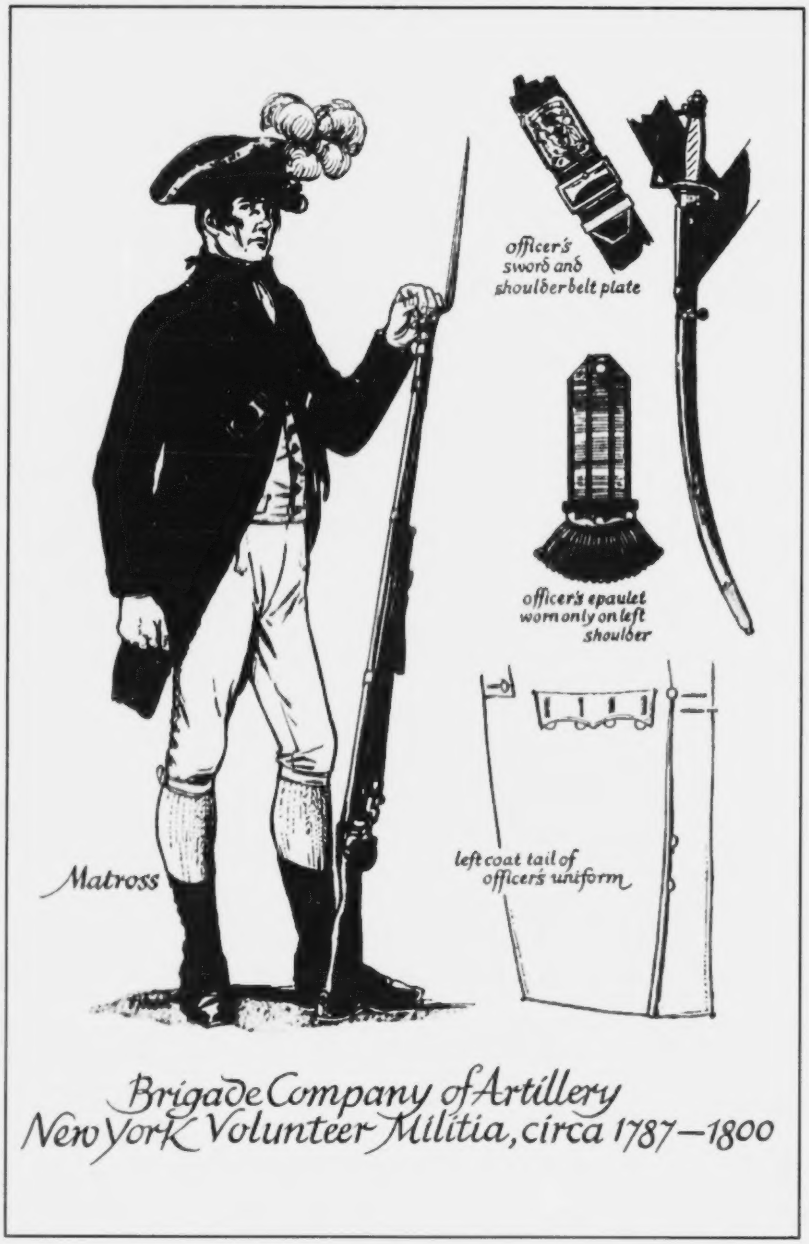
Six weeks later, a committee of eleven, including Madison, recommended a more explicit statement of the armed citizenry's importance to the constitutional order: "A well regulated militia, composed of the body of the people being the best security of a free state, the right of the people to keep and bear arms shall not be infringed." The provision for conscientious objection was rephrased to read "no person religiously scrupulous shall be compelled to bear arms." Notice that the amendment's authors used the term "people" to describe the collective right of citizens to provide for their common defense. On matters concerning individual rights—in this case the free exercise of conscience—the framers of the Bill of Rights used the term "person."

Congress reacted favorably to the committee's recommendations. The doubts that were raised focused on guaranteeing the militia's place under the new constitutional order. Elbridge Gerry, noting that ambitious governments always sought to "destroy the militia," recommended rephrasing the proposal to make it "the duty of the Government to provide . . . a well regulated militia, trained to arms." Other congressmen expressed reservations about the amendment's failure to link freedom of conscience to the obligation to find a substitute or to pay an "equivalent." Before sending the amendment on to the Senate, the House of Representatives came within two votes of striking the conscientious objection clause.

Little is known about the Senate's deliberations. It struck the controversial conscientious objection clause, probably for the same reasons mentioned in the House. It also rejected as redundant a proposal to insert "for the common defence" after "to bear arms." Finally, the Senate accepted an amendment to describe the militia as "necessary to," rather than the "best" form of, national defense. This language more accurately expressed the growing sentiment that regular soldiers also had an important role to play in the defense of the republic, especially during wartime.

The House and Senate approved the new language during the last week of September 1789. Unfortunately, we know little about the Second Amendment's reception in the states. No state rejected the amendment. As a statement of republican principle already commonplace in many state declarations of rights, it probably evoked little discussion.

Whatever the issues, when Virginia ratified the Second Amendment on December 15, 1791, "A well


officer's sword and shoulderbelt plate
officer's epaulet worn only on left shoulder
Matross
left coat tail of officer's uniform
Brigade Company of Artillery
New York Volunteer Militia, circa 1787–1800

Brigade Company of Artillery, New York Volunteer Militaman, circa 1787—1800. Library of Congress.

regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed" became part of the Constitution. The notion that republicanism depended on a vital militia had become part of the nation's higher law. Henceforth, Congress was prohibited from taking any action that might disarm or otherwise render the militia less effective. The Second Amendment, then, stated a basic principle of American republicanism: The body politic's ability to defend the liberties of the people and the constitutional foundations of the state against an ambitious tyrant's professional army or a manipulative demagogue's armed mob could not be infringed.

For the past two hundred years, American legal and constitutional opinion has seldom wavered from this interpretation of the Second Amendment. Supreme Court Justice Joseph Story, the early nineteenth century's foremost constitutional commentator, believed that the Second Amendment guaranteed "a well regulated Militia." He worried only that American indifference to militia service threatened to undermine "all the protection intended by this clause of our national bill of rights." Fifty years later Thomas M. Cooley, a constitutional theorist of similar stature, wrote that the right to bear arms in the United States "extends no further than to keep and bear those arms which are suited and proper for the general defense of the community against invasion and oppression." The states and Congress were otherwise unrestricted in their power to regulate the ownership of arms. Few state or federal judicial decisions have contradicted Cooley's conclusion. The opinion handed down by the New Jersey Supreme Court in *Burton* v. *Sills* (1968) is typical of what is nearly two hundred years of constitutional opinion solidly founded on eighteenth-century precedent: "The Second Amendment, concerning the right of the people to keep and bear arms, was framed in contemplation not of individual rights but of the maintenance of the states' active, organized militias."

Suggested additional reading:

Lawrence Delbert Cress, "An Armed Community: The Origins and Meaning of the Right to Bear Arms," *Journal of American History* 71 (1984), pp. 22–24.

Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (1984).

J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975).

Robert E. Shalhope, "The Ideological Origins of the Second Amendment," *Journal of American History* 69 (1982), pp. 599–614.

Robert A. Rutland, *The Birth of the Bill of Rights, 1776–1791* (rev. ed. 1983).

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DOCUMENTS

The Case of the Century: *Brown* v. *Board of Education of Topeka*

by HUGH W. SPEER

After the Civil War, Congress proposed three amendments to the Constitution which were duly ratified by the states as a condition of re-establishing representation in Congress.

The Thirteenth Amendment abolished slavery and the Fifteenth guaranteed the right to vote to black males. The Fourteenth Amendment had more comprehensive goals:

> *No state shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction equal protection of the laws.*

The Civil War Amendments were put to the test in 1896 in *Plessy* v. *Ferguson*. Plessy, a black man, was arrested for trying to board a "white" northbound railroad coach in New Orleans; he appealed to the Supreme Court. In deciding against him, the Court established the "separate but equal" principle. Writing for the majority of the Court, Justice Henry B. Brown said:

> *The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. . . .*
>
> *We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.*
>
> **Plessy v. Ferguson, 163 U.S. 537 (1896).**

Justice John Marshall Harlan wrote a brilliant dissent to the *Plessy* decision. Harlan said, in part:

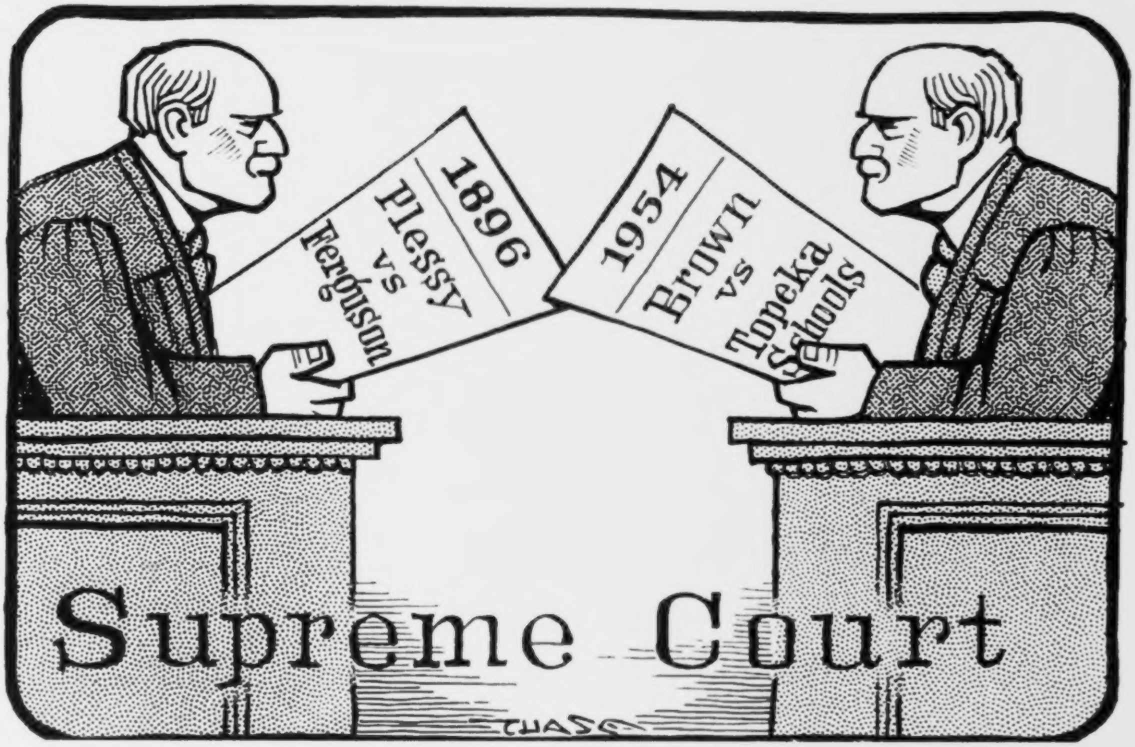
> *In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.*
>
> *In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.*
>
> **Plessy v. Ferguson, 163 U.S. 537 (1896).**

Separate and Unequal for Fifty-Eight Years

The "separate but equal" principle stood for fifty-eight years as state laws in the South required segregation in almost all areas of public accommodation and education. In few cases were the conditions "equal" as well as "separate." Between 1935 and 1950 black plaintiffs took five university cases to the U.S. Supreme Court and won them all, but only because the facilities were inferior, not because they were "separate."

Thurgood Marshall, now a member of the Supreme Court, argued four of these cases as chief counsel of the NAACP. In an interview in 1967, when he was solicitor general, Marshall recalled the circumstances that led to a suit against the University of Oklahoma:

> *The regents required separate classes for blacks. One day I had a call from President Cross saying, "Guess what happened this morning. A black man insists on enrolling in marching band. How can we have a separate marching band for one man?" I replied: "Pretty good trick, isn't it?"*
>
> **Recorded interview by Dr. Hugh Speer with Thurgood Marshall, Washington, D.C., April 3, 1967.**



Cartoon by John Chase, published originally in the New Orleans States-Item, May 1, 1977. Courtesy The Historic New Orleans Collection.

At the same institution a black student enrolled in the graduate school. Marshall remembered:

> *They made him sit in an anteroom or at the back behind barricades made out of two-by-fours or ropes. The students tore out the two-by-fours and cut up the ropes into one inch pieces and gave them out as souvenirs. . . . Someone always joined him at his "separate" table in the library and cafeteria.*

When Oklahoma set up a separate but obviously unequal law school for blacks, Marshall recollected:

> *I counted the law books in its library and found that there were far more law books in the penitentiary library. So I told the judge that the best way for a black to get a legal education in Oklahoma was to go to the penitentiary. He laughed. We had him.*

Marshall recounted another story about a Texas case:

> *[In Texas] they tried setting up a one horse law school in connection with Prairie View Institute, which specialized in broom making, and changed the name to Prairie View University without one dollar increase in budget. It was so obvious to the Supreme Court that the decision was easy.*

For a unanimous Court, Chief Justice Fred M. Vinson wrote:

> *The University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.*

Sweatt v. Painter, 399 U.S. 629 (1950).

Brown v. Board of Education at Topeka

With these occasions, the Supreme Court had "whittled away" at the segregation issue and had almost concluded that "separate" could not possibly be "equal." The stage was set for *Brown* v. *Board of Education* in U.S. District Court at Topeka in 1951.

The Topeka case, along with appeals of similar cases from South Carolina, Virginia, Delaware and the District of Columbia, resulted in the landmark decision of 1954 declaring school segregation unconstitutional. Robert Carter, counsel for the NAACP in New York, asked this author to conduct a school survey, to help recruit expert witnesses in the social sciences and to give the first testimony. Little tangible difference between white and black schools emerged except in building and books. The day before the trial, the lawyers and several witnesses agreed to use the findings that suggested that the buildings and books were inferior as a strategy to divert the defense lawyer, which it did, but to put the emphasis on the social and psychological damage of segregation per se, regardless of whether or not the facilities were comparable. This strategy marked a distinct turning point in the history of segregation cases. None of the five university cases had argued that even equal separate facilities could be inadequate.

Testimony in the Topeka case made a clear connection between segregation and deprivation in the curriculum:

> *"Curriculum" means the total school experience of the child. . . . Education is more than just remembering something. It is concerned with the child's total development, his personality, his personal and social relations. . . . The more heterogeneous the group in which the children participate, the better they can function in our multi-cultural society. . . . If the colored children are denied the experience in school of associating with white children who make up about 90 percent of our national society, then their curriculum is being greatly curtailed. The Topeka curriculum or any curriculum cannot be equal under segregation.*

Testimony of Dr. Hugh Speer, *Brown* v. *Board of Education*, Topeka, 98 f. Supp. 997, June 21, 1951.

The defense attorney argued that school integration could present new problems:

> *Now assuming that we did not have separate schools and the children were all together, and you still had a social situation in this community which did not recognize commingling of the races, didn't admit them on free equality. . .wouldn't that make more of a tempest, more of an emotional strain or psychological impact if he got used to going to school with white children, then went*

Kindergarten class, 1949, of Linda Brown (back row, fourth from the right), daughter of the plaintiff in Brown v. Board of Education of Topeka, Kansas, 1954. Courtesy of the Topeka Capital-Journal, Topeka, Kansas.

> *downtown and could not eat in a white restaurant, couldn't go to a white hotel, and couldn't do this and that?*
>
> ***Brown* v. *Board of Education*, Topeka, 98 f. Supp. 797, June 21, 1951.**

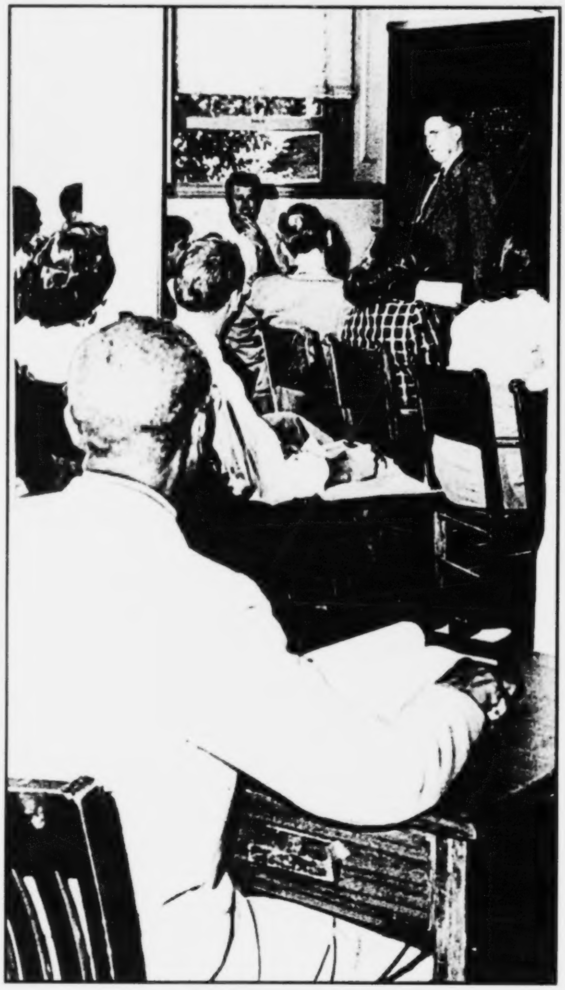
The superintendent of schools testified, in the same vein, that "there is nothing in the record historically that it is the place of the public school system to dictate the social customs of the people.... We have no objective evidence that the majority sentiment of the public would desire a change in the fundamental structure."

The presiding judge, Walter Huxman, showed some impatience with this argument and intervened with the question: "May I ask counsel on both sides... assuming that the schools are maintained in accordance with social customs... and the wishes of the people...what bearing does that have on the right to so maintain them under the Fourteenth Amendment?" Receiving no satisfactory reply, the Judge repeated: "The question is what the Fourteenth Amendment warrants and what it doesn't. We don't care what social custom provides." With obvious delight, Mr. Carter replied, "We agree with that, your honor."

Dr. Louisa Holt Howe, social psychologist at the Menninger Foundation Clinic in Topeka, a witness for the NAACP, then pointed to the impact of legally authorized discrimination:

> *The fact that [segregation] is enforced, that it is legal, I think, has more importance than the fact of segregation itself because this gives legal and official sanction to a policy which is inevitably interpreted by both black and white people as denoting the inferiority of the Negro group. . . . A sense of inferiority must always affect one's motivation for learning, since it affects the feeling one has for oneself, as a person, as a personality, or a self or an ego identity, as Erick Erickson has recently expressed it.*
>
> ***Brown* v. *Board of Education*, Topeka, 98 f. Supp. 797, June 22, 1951.**

Testimony was given by five other social scientists from Michigan State, Ohio State, Chicago, Notre Dame and the University of Kansas City, in the fields of education, pyschology, sociology, and human development.



First black to be admited to Oklahoma University, from the October 15, 1948 issue of The Daily Oklahoman. Copyright © 1948. The Oklahoma Publishing Company. Photograph by George Tapscott.

On August 3, 1951, the Topeka court decided unanimously in favor of the Board of Education. Judge Huxman later explained that the judges felt the differences in facilities were minor and unintentional and that the district court was bound by the "separate but equal" decision. It was the business of the Supreme Court to reverse itself. But Judge Huxman insisted, he said, on "wrapping up the decision in such a way that the Supreme Court could no longer duck it."

He summarized the social science arguments in his findings of fact:

> *Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of the law, therefore, has a tendency to retard the educational and mental de-*

> *velopment of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.*
>
> ***Brown* v. *Board of Education*, Topeka, 98 f. Supp. 797 (1951).**

Before the Supreme Court

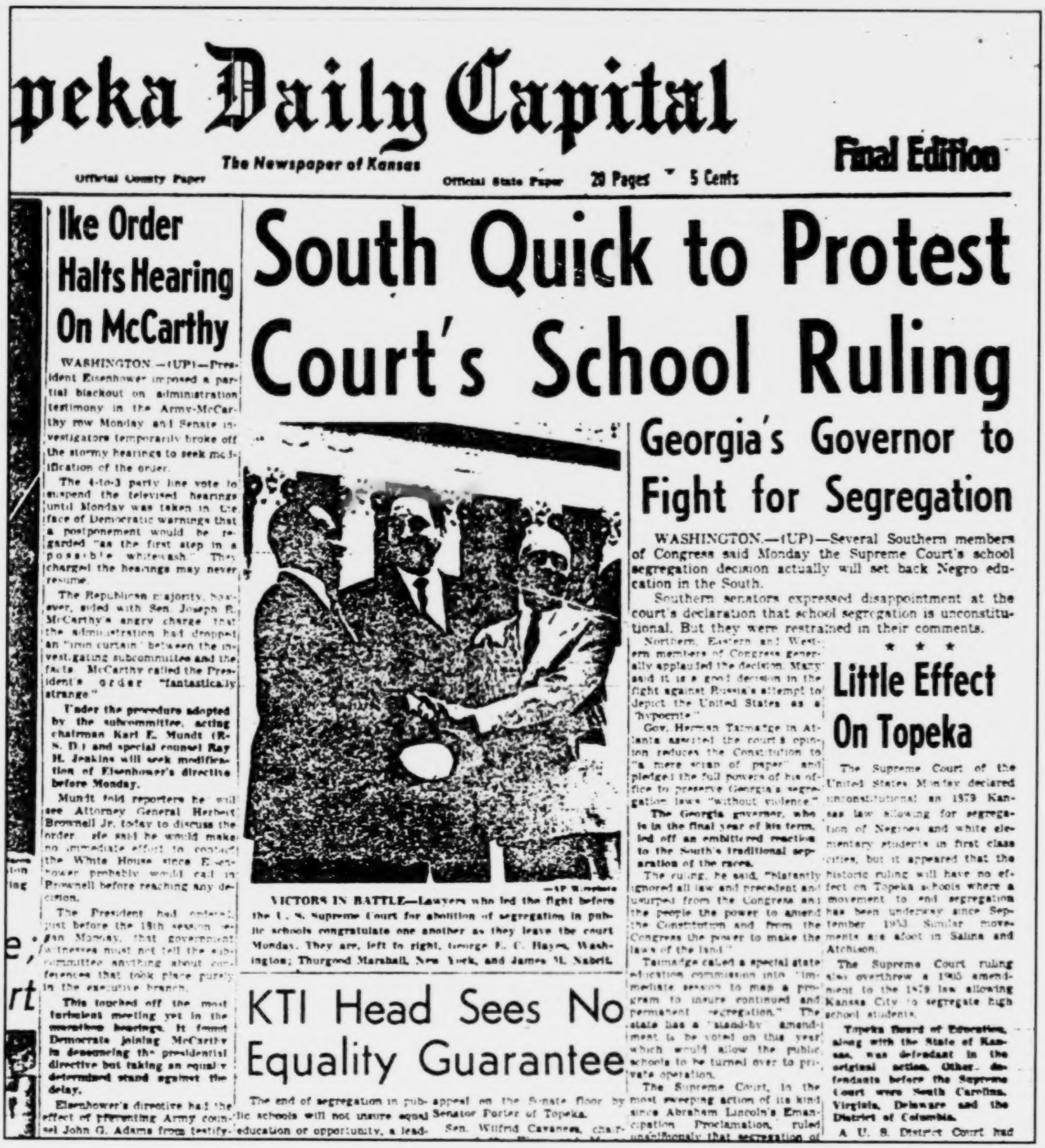
The case moved rapidly on appeal heard by the Supreme Court beginning on December 9, 1952, in combination with four related cases. Under Chief Justice Fred Vinson, the Court first asked in 1952 for a study of the intent of Congress in submitting the Fourteenth Amendment and the understanding of the states which ratified it, but the evidence available did not provide a clear answer. The decision could not be made in the context of 1868. Vinson died and President Eisenhower appointed Earl Warren, ex-governor of California, as Chief Justice.

The Warren court took a liberal turn. The new Chief Justice swept aside the historical and legalistic approach established under Vinson, saying:

> *In approaching this problem we cannot turn the clock back to 1868 when the amendment was adopted nor to 1896 when* Plessy *v.* Ferguson *was written. We must consider public education in the full light of its full development and its present place in American life throughout the nation.*
>
> ***Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).**

The final arguments before the Supreme Court came from two sharply different personalities. The segregationist cause was argued by John W. Davis, head of one of the largest and most prestigious law firms in New York. Eighty at the time of the trial, he had been a congressman, solicitor general, ambassador to Great Britain, and the Democratic candidate for president in 1924. Thurgood Marshall, chief counsel of the NAACP, and grandson of a slave, spoke for the integrationists. The following excerpt comes from *Briggs* v. *Elliott*, one of the cases decided under the general heading of *Brown*.

> *Mr. Davis: May it please the court, it is a little late. . .after this question has been presumed to be settled for ninety years—it is a little late to argue that the question is still at large.*
>
> *We have the uncontradicted testimony of expert witnesses that segregation is hurtful, and in their opinion hurtful to the children of both races, both colored and white. These witnesses severally described themselves as professors, associate professors, assistant professors and one describes herself as a lecturer and adviser on curricula. I am not sure exactly what that means.*
>
> *I do not impugn the sincerity of these learned gentlemen and lady. I am quite sure that they believe that they are expressing valid opinions on their subject. But there are two things notable about them. Not a one of them is under any official duty in the premises whatever; not a one of them has had to consider welfare of the people for whom they are legislating or whose rights they were called on to adjudicate. And only one of them professes to have the slightest knowledge of conditions in the states where separate schools are now being maintained. Only one of them professes any knowledge of the conditions within the seventeen segregating states.*
>
> *. . .I am tempted to digress with the professors because I am discussing the weight and pith of this testimony, which is the reliance of the plaintiffs here to turn back this enormous weight of legislative and judicial precedent on this subject. I may have been unfortunate, or I may have been careless, but it seems to me that much of that which is handed around under the name of social science is an effort on the part of the scientist to rationalize his own preconceptions. They find usually, in my limited observation, what they go out to find.*
>
> *I ran across a sentence the other day which somebody said who was equally as expert of Dr. Krech in the "lingo" of the craft. He described much of the social science as "fragmentary expertise based on an examined presupposition."*
>
> *All that the Negroes want in this is a matter of prestige.*
>
> *Mr. Marshall: May it please the court,*



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Final Edition

Ike Order Halts Hearing On McCarthy

WASHINGTON.—(UP)—President Eisenhower imposed a partial blackout on administration testimony in the Army-McCarthy row Monday and Senate investigators temporarily broke off the stormy hearings to seek modification of the order.

The 4-to-3 party line vote to suspend the televised hearings until Monday was taken in the face of Democratic warnings that a postponement would be regarded "as the first step in a possible whitewash." They charged the hearings may never resume.

The Republican majority, however, sided with Sen. Joseph R. McCarthy's angry charge that the administration had dropped an "iron curtain" between the investigating subcommittee and the facts. McCarthy called the President's order "fantastically strange."

Under the procedure adopted by the subcommittee, acting chairman Karl E. Mundt (R-S. D.) and special counsel Ray H. Jenkins will seek modification of Eisenhower's directive before Monday.

Mundt told reporters he will see Attorney General Herbert Brownell Jr. today to discuss the order. He said he would make no immediate effort to contact the White House since Eisenhower probably would call in Brownell before reaching any decision.

The President had ordered, just before the 19th session began Monday, that government witnesses must not tell the subcommittee anything about conferences that took place purely in the executive branch.

This touched off the most turbulent meeting yet in the marathon hearings. It found Democrats joining McCarthy in denouncing the presidential directive but taking an equally determined stand against the delay.

Eisenhower's directive had the effect of preventing Army counsel John G. Adams from testify-

South Quick to Protest Court's School Ruling

—AP Wirephoto

VICTORS IN BATTLE—Lawyers who led the fight before the U. S. Supreme Court for abolition of segregation in public schools congratulate one another as they leave the court Monday. They are, left to right, George E. C. Hayes, Washington; Thurgood Marshall, New York, and James M. Nabrit.

Georgia's Governor to Fight for Segregation

WASHINGTON.—(UP)—Several Southern members of Congress said Monday the Supreme Court's school segregation decision actually will set back Negro education in the South.

Southern senators expressed disappointment at the court's declaration that school segregation is unconstitutional. But they were restrained in their comments.

Northern, Eastern and Western members of Congress generally applauded the decision. Many said it is a good decision in the fight against Russia's attempt to depict the United States as a "hypocrite."

Gov. Herman Talmadge in Atlanta asserted the court's opinion reduces the Constitution to "a mere scrap of paper" and pledged the full powers of his office to preserve Georgia's segregation laws "without violence."

The Georgia governor, who is in the final year of his term, led off an embittered reaction to the South's traditional separation of the races.

The ruling, he said, "blatantly ignored all law and precedent and usurped from the Congress and the people the power to amend the Constitution and from the Congress the power to make the laws of the land."

Talmadge called a special state education commission into "immediate session to map a program to insure continued and permanent segregation." The state has a "stand-by" amendment to be voted on this year which would allow the public schools to be turned over to private operation.

The Supreme Court, in the most sweeping action of its kind since Abraham Lincoln's Emancipation Proclamation, ruled unanimously that segregation of

* * *

Little Effect On Topeka

The Supreme Court of the United States Monday declared unconstitutional an 1879 Kansas law allowing for segregation of Negroes and white elementary students in first class cities, but it appeared that the historic ruling will have no effect on Topeka schools where a movement to end segregation has been underway since September 1953. Similar movements are afoot in Salina and Atchison.

The Supreme Court ruling also overthrew a 1905 amendment to the 1879 law allowing Kansas City to segregate high school students.

Topeka Board of Education, along with the State of Kansas, was defendant in the original action. Other defendants before the Supreme Court were South Carolina, Virginia, Delaware and the District of Columbia.

A U. S. District Court had

KTI Head Sees No Equality Guarantee

The end of segregation in public schools will not insure equal education or opportunity, a lead-

appeal on the Senate floor by Senator Porter of Topeka.

Sen. Wilfrid Cavaness, chair-

Kansas State Historical Society.

what Mr. Davis has just said about prestige is exactly right.

So far as the appellants are concerned in this case, at this point it seems to me that the significant factor running through all these arguments up to this point is that for some reason, which is still unexplained, Negroes are taken out of the main stream of American life.

There is nothing involved in this case other than race and color, and I do not need to go to the background of the statutes or anything else. I just read the statutes, and they say, "white and colored."

While we are talking about the feelings of the black people, I think we must once again emphasize that under our form of government, these individual rights of minority people are not to be left to even the most mature judgment of the majority of the people, and that the only testing ground as to whether or not individual rights are concerned is in this court.

***Briggs* v. *Elliott*, 345 U.S. 483 (1954).**

On May 17, 1954, the Chief Justice read the court's unanimous decision to an anxious nation, quoting in part from Judge Huxman's statement. In conclusion, Warren stated:

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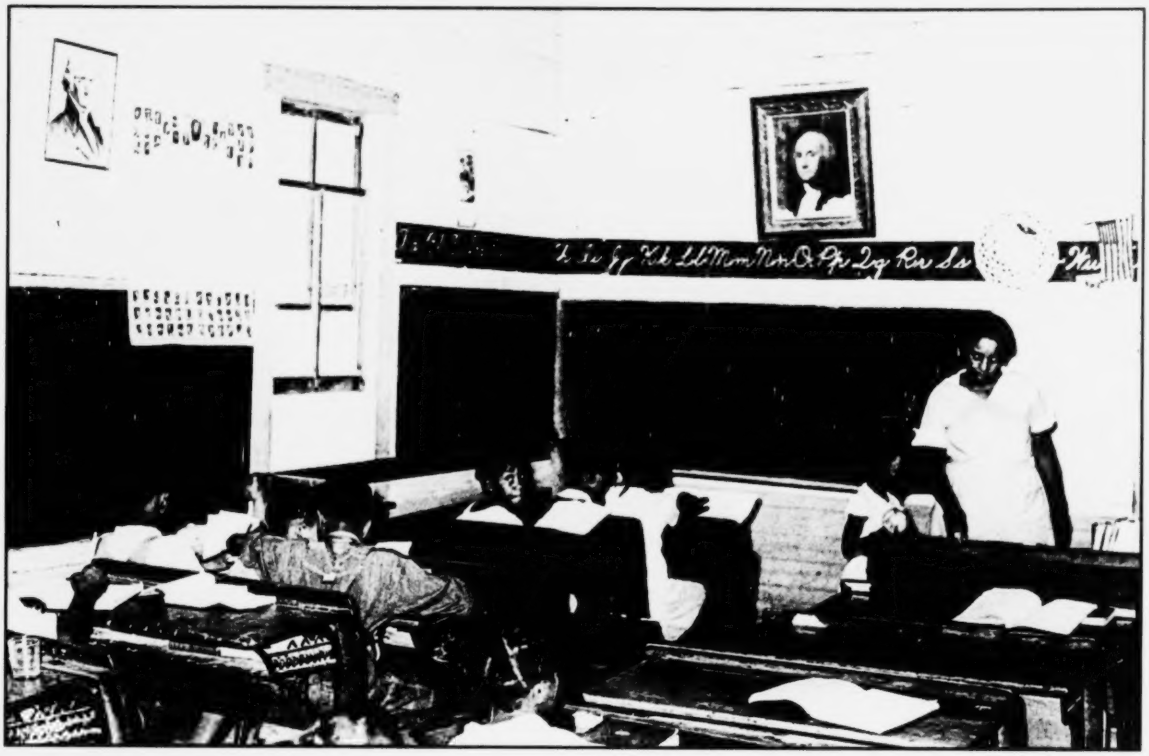


A segregated primary school, southeastern Missouri, 1938. Library of Congress.

In approaching these problems we cannot turn the clock back.

Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . .

Whatever may have been the extent of psychological knowledge at the time of Plessy *v.* Ferguson, *this finding is amply supported by modern authority. Any language in* Plessy *v.* Ferguson *contrary to this finding is rejected.*

We conclude that in the field of public education the doctrine of "Separate but Equal" has no place. Separate educational facilitites are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reasons of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

It is so ordered.

***Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).**

In many parts of the country the reaction was immediate and volatile. May 17 was named "Black Monday," and a group of Southern political leaders issued the "Southern Manifesto," with echoes of secession and state rights.

In the concluding paragraph of his 1954 decision, the Chief Justice stated that remedies required further consideration and the Supreme Court would address them separately.

Brown II

The arguments over remedies began on April 11, 1955, and the decision was handed down on May 31, 1955. This case became known as *Brown II*. (Another hearing to determine if the Topeka Board

NAACP attorney Thurgood Marshall. Courtesy of Afro-American, Baltimore, Md.

of Education had carried out the orders under *Brown I* and *Brown II* was held in October 1986, before the U.S. District Court in Topeka. This case is known as *Brown III*.)

In the *Brown II* arguments, it was generally agreed that the order of *Brown I* should be carried out under the supervision of the U.S. District Courts. The main arguments centered around the issues of time, flexibility and degree of local option. The attorney general for Kansas said there would be no problem in complying by the following September. In Delaware, the situation was relatively simple because the state courts had already ordered the admission of blacks to the new high school as a "present and personal" right.

However, the attorney generals from South Carolina, Virginia and other southern states, appearing as friends of the court, argued for gradual approaches and a high degree of local participation and authority. The importance of "community acceptance" was emphasized. The Virginia attorney argued that "the May 17 decree would have a crushing impact . . . on a way of life enshrined and institutionalized in hearts and minds . . . and deep seated devotions to the customs and traditions. Due to the concept of the right of the people to govern, to support or not support a system of public education as they may choose. . .[there is] the bleak prospect of serious impairment or possible destruction of the public school system." North Carolina counsel asserted that "only three of 165 school superintendents of North Carolina believed that it would be possible to use Negro teachers in mixed schools." A committee of superintendents from Oklahoma advocated "a policy of gradual adjustment."

When Florida argued for time and local option, Thurgood Marshall pointed out that it had taken five years after the Texas and Oklahoma law school decisions for Florida to open its law school to blacks. Some cited the failure of national prohibition to claim that court-ordered segregation would fail; Marshall expressed shock that anybody "classed the right to take a drink of whiskey. . .with the right of a Negro child to participate in education" and argued for "uniform application of the Constitution and all its provisions throughout the country."

Marshall's first choice was for action "forthwith." His second and third choices were for September 1, 1955, and September 1, 1956, respectively—nothing later. The Attorney General of the United States proposed enforcement "as soon as feasible, allowing time for effective gradual adjustment and requiring a plan for starting within ninety days."

On May 31, 1955, Chief Justice Warren spoke for a unanimous court granting time for districts to come into compliance:

> *Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.*
>
> *. . . At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. . . . It should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagree-*

> *ment with them.*
>
> *While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.*
>
> *. . . The cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.*
>
> *It is so ordered.*

***Brown* v. *Board of Education of Topeka*, 349 U.S. 294 (1955).**

There were conspicuous instances of protest. Governor George Wallace stood in the door at the University of Alabama to block the entrance of the first black student. President Eisenhower was obliged to send the National Guard to Little Rock against the open defiance of Governor Faubus. But there were also many positive and successful efforts made in good faith. Such efforts were reinforced by the marches and non-violent movement led by Dr. Martin Luther King and others.

In Perspective

During an interview in 1967, Thurgood Marshall was asked if the social science arguments were the new element that made the difference. He replied:

> *No doubt about it in my book. In 1896 they argued that segregation did not hurt anybody. But now nobody dares argue that segregation is not harmful. The only way I can be sure my kid is getting an equal education is for him to be in the same classroom with the whites. It finally comes out that "equal" means "equal." As Justice Frankfurter once said, "Sometimes English words mean English."*

Marshall said the "all deliberate speed" phrase had been used by Holmes and Frankfurter, then added:

> *The night after [Brown II], I was back in my office with several friends and [a] secretary. . . who is very sharp. She went to Webster's dictionary and looked up the word "deliberate." It said "slow"—all slow speed. How right that girl was! How right she was!*

Recorded interview by Dr. Hugh Speer with Thurgood Marshall, Washington, D.C., April 3, 1967.

Three decades have brought both progress and disappointment. Discrimination no longer bears the "sanction of law." But de facto segregation has displaced de jure segregation in some areas. The *Brown* decision abolished de jure segregation but it did not directly order integration. Congress followed ten years later with the Civil Rights Act of 1964. The issue now is affirmative action; does a "color blind" Constitution make affirmative action unconstitutional?

The eyes of the world are on America. In *An American Dilemma* (1944), Gunnar Myrdal, the distinguished Swedish social scientist said, "America is free to choose whether the Negro shall continue to be her problem or become her opportunity." His question remains pertinent.

Suggested additional reading:

Albert P. Blaustein and Clarence C. Ferguson, Jr., *Desegregation and the Law: The Meaning and Effect of the School Segregation Cases* (1957).

Leon Friedman, ed., *Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952–55* (1969).

Jack Greenberg and Herbert Hill, *Citizen's Guide to Desegregation: A Study of Social and Legal Change in American Life* (1979).

Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1976).

Hugh W. Speer is Dean Emeritus of the School of Education at the University of Missouri. He served as an expert witness in *Brown* at the trial in Topeka in 1951. A one-hour docu-drama, "The Case of the Century," has been produced by Johnson Country Community College, Overland Park, Kansas 66210, based upon a script by Hugh Speer. Video tapes and study guides are available from the college.

For the Classroom

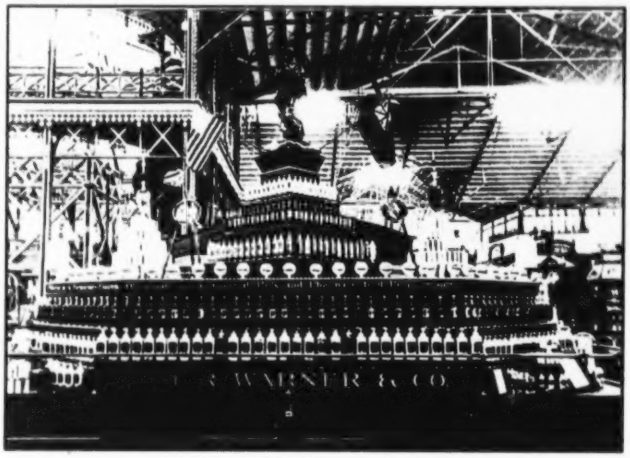
The Constitution: An Economic Framework

by Peter R. Senn and William J. Stepien

This teaching activity is reprinted with permission from the Senior Economist, *vol. 2, no. 1, fall 1986, published by the Joint Council on Economic Education. Subscriptions to the* Senior Economist *and additional teaching materials are available from the Joint Council on Economic Education, 2 Park Avenue, New York, N.Y. 10016. The lesson has been edited for inclusion in* **this Constitution**.

Introduction

The following teaching suggestions include a broad range of economic ideas. First, we suggest that you review with your students several of the problems which faced our nation under the Articles of Confederation including an economically weak central government and a large war debt. The second activity introduces students to the theory of mercantilism and how the ideas it represented were in contrast to the principles espoused by Adam Smith in his famous book *Wealth of Nations*. The students are invited to search the Constitution for examples of the influence of Adam Smith by looking for ideas related to free people and free markets. The third activity suggests that students work in pairs or trios and draw a series of connected circles on newsprint which illustrate the "ripple effects" that might take place if the Constitution were written differently. Finally, the students participate in a role play activity where they consider the economic impact of various pieces of legislation.



Display of the Warner Pharmaceutical Company at the Centennial Exhibit, Philadelphia, 1876. Division of Political History, Smithsonian Institution, Washington, D.C.

Student Goals

1. Students recognize that the economic ideas of the Constitution developed from a specific historical setting by identifying some economic problems of the Revolutionary War, such as war debts, and of the Articles of Confederation such as the inability to regulate interstate commerce.
2. Students recognize that the Constitution can be altered to meet the conditions of the times by giving examples of changes as with slavery.
3. Students show that they understand the relationship between the Constitution and economics by identifying the sections of the Constitution having economic importance.
4. Students recognize the economic impact of the Constitution by describing the possible consequences of changing it.
5. Students analyze proposed changes in laws by describing the trade-offs and opportunity costs of the changes.

Teaching Activities

I. Articles of Confederation

Remind the class that by the summer of 1776 thirteen independent states had been created from the original British colonies. Because they knew they would have to unite to win the War of Independence, delegates from these states met in the Continental Congress even though they were not sure of the kind of union they wanted or needed.

In 1777 the delegates adopted the Articles of Confederation. The articles created a loose union of free and independent states called the United States of America. The Articles were adopted by all the states in 1781. The Continental Congress became the governing body.

Explain the economic powers of the Articles of Confederation:

- —The Continental Congress could establish a postal service, regulate the currency, and borrow money.
- —It could not regulate interstate or foreign commerce, levy taxes, or enforce its laws because it contained no provision for an executive or federal judiciary.
- —The end of the War for Independence left Congress facing huge debts, both public and private; depreciated paper money of uncertain value because seven states had also issued their own currency; lost trade including that of the Mediterranean because of piracy and other economic problems which led to a post-war depression.

The Treaty of Paris in 1783 ended the war but not until the Philadelphia Convention of 1787 was a new Constitution written.

Ask the students how the conditions that follow might have affected the economic life of the new states.

- —In view of the war debt, how might the inability to regulate interstate trade create economic problems for the new nation?
- —How might states issuing their own currency confuse matters?

II. The Constitution - A Framework for Economic Growth

Explain to the class that British economic policies toward the colonies were guided by a set of ideas called mercantilism. The overall goal of mercantilism was to increase the power and wealth of England. Other aims were to make the British

empire self-sufficient and guarantee the profits of trade to the English. The colonies were supposed to supply goods that England needed and provide markets for the goods England had to sell.

The policies of mercantilism included many kinds of restrictions on trade, subsidies for the production of certain kinds of goods and the granting of various monopolies. Government played a large and arbitrary role in the economy.

In 1776, Adam Smith published a book called *Wealth of Nations*. In it he showed how mercantilism gave special privileges to selected special groups, promoted monopoly and was inefficient. Smith called for a more limited role of government so that markets and decisions made by individuals could generate greater wealth and growth. The ideals of free men and free markets appealed to the Founding Fathers. They embodied many of them in the Constitution.

Ask the students to study the Constitution to find where each of the following topics is considered. (The teacher editions of most high school U.S. history texts have annotated copies of the Constitution which will provide background for discussion. U.S. history and government textbooks usually have complete copies for students to examine.) Then have the students explain how the Constitution's treatment of the topic is an example of the high value placed on a market economy and free people. This last step should be taken while considering the economic impact of the constitutional language examined.

1. Where is the final decision on slavery found? (Amendment XIII)
2. Where do bills for raising revenues originate? (Article I, Section 7)
3. Who has the power to levy and collect taxes and duties? (Article I, Section 8)
4. Who has the power to coin money and regulate its value? (Article I, Section 8)
5. What branch of government regulates business? (Article I, Section 8)
6. What branch of government has the power to make and ratify treaties? (Article II, Section 2, and Article I)
7. Where do you find whether or not states can tax items entering from other states? (Article I, Section 9)
8. Where does the Constitution explain whether one port can be given special preference over another? (Article I, Section 9)
9. How do you know that the Post Office is not a private business? (Article I, Section 8)
10. Where does the United States government get its power to build highways? (Article I, Section 8)
11. What section provides that our federal finances are a matter of public knowledge? (Article I, Section 9)
12. Who makes the rules about what goes on in territories or other properties belonging to the United States? (Article IV, Section 3)
13. What section prevents states from making their own money? (Article I, Section 10)
14. Can you sue the government if you think it has done something wrong? (Amendment 1)
15. Where does it say that property is protected by due process of law? (Amendment 5)
16. Do you have to be a taxpayer in order to vote? (Amendment 24)
17. Who has the power to tax goods entering the United States from other nations? (Article I, Section 8)

III. What if . . .?

Select one of the answers to the questions in Activity II and ask the students to consider what would happen if the opposite of that statement became true. For example, ask the students to speculate on the economic impact of making the Post Office into a private business, or what might happen if the United States government could not coin money. Ask the students to discuss the changes that might occur in our way of life.

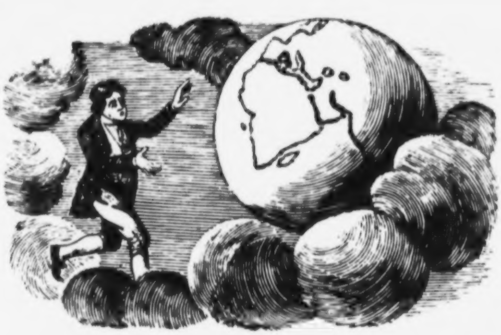
Point out that in most instances these changes have an effect on many segments of society. The change ripples throughout society creating numerous other changes which initiate even further change.

To illustrate this concept graphically, organize the students into pairs or triads. Give each a piece of newsprint. Ask the students to place a circle about the size of a half dollar in the middle of the newsprint. For example, inside the circle have the students write that the Post Office is now a private business. Ask the groups to each come up with a change that might result from the Post Office moving into the private sector. Tell the groups to write this change on their newsprint in another circle near the circle in the center of the page. When they have completed that, connect the two circles with a straight line.

Now have the students consider the change they have just written in the second circle. Considering just that change, what further changes might happen in our way of life? Each new change should be written in a circle clustered near the second circle and each change should be connected with the second circle by a straight line.

Now direct the attention of the students to each of the new changes they have just written into circles on the page. Ask the students to consider further changes which might result from each of the last wave of changes. When they have completed this operation, ask them to go back to the original change in the middle of the page and have them consider another major change in our way of life which would result from the Post Office becoming a private business. This change should be described in a circle which is connected to the original circle in the middle of the page by a straight line. It becomes evident that when a change happens in our society, it causes secondary, tertiary and even more removed changes to occur.

When the students have completed 10 or 15 minutes of iden-



tifying changes, give each group an additional piece of newsprint and have them pick one of the items discussed in Activity II and treat it as a "What if?" statement. For example, have them consider what might happen if the government could confiscate property without due process of law? What if a person had to be a taxpayer or property owner in order to vote? What if the executive branch of government could create taxes without the check or balance of the legislative and judicial branches?

When the students have completed 20 minutes of work in identifying changes, the groups should share their changes with the class. Special attention should be given to positive and negative results from the initial change.

IV. New Laws and the Economy: A Simulation

Action or inaction by Congress and President in passing new legislation has numerous effects on the American economy. Three important areas of our economic system can be directly influenced by acts of Congress: inflation, unemployment, and growth. Even though the Constitution established an environment for a free enterprise economy, the fact that the federal government participates in the economy makes it an important economic force.

Three bills are presented as examples. Assume that each has been introduced in Congress. Ask the students to speculate on how each might affect unemployment, economic growth and inflation. After the class has speculated on the impact of each bill, divide the class into two unequal groups, one having just slightly larger membership than the other. This simulates two political parties with unequal power in one of the houses of Congress.

Next establish special interest groups on either side of the aisle by further dividing each group into subgroups of legislators representing manufacturers, agriculture, hawks, doves, liberals, conservatives or other groups which might have conflicting ideas about each piece of legislation. As each bill is introduced into Congress for debate, ask the students to express their viewpoints, especially their economic viewpoints, on each piece of legislation, keeping in mind that they represent a particular philosophical position on each issue. For simplicity's sake, assume that each bill can be passed by simple majority of students voting.

With the teacher acting as President, each bill that is passed is placed on the President's desk for signature. The President has the option of signing the bill into law or returning the bill to Congress through the veto process. Then the students can attempt to override the veto by a 2/3 vote.

Before discussion of each bill in class, establish current economic conditions for our country by writing information on the chalkboard. Consider starting with 7 percent unemployment. The rate of inflation for the country might be 6 percent. Economic growth might be 3 percent. As each bill is passed, defeated, or vetoed, discuss what effect that action might have on each of the three rates on the board. Increase or decrease each rate before moving on to the next bill. This provides new economic conditions for each of the pending bills.

Bill #1. Subsidy for Grain Prices.

Farm incomes have been declining and the market value of grain crops has been dropping. This bill would give farmers a subsidy of $1 per bushel on all grain products produced this coming year.

Possible positive effects include increased farm output, improved farm-related business, more grain exports, reduced consumers' cost for food. Possible negative effects include an increased grain surplus, lower market price for farm goods, increased cost of government programs.

Depending on the economy as a whole, these changes could occur.

(U) Unemployment - stays the same or decreases slightly
(G) Growth - declines slightly
(I) Inflation - increases slightly

Bill #2. Domestic Parts in United States Cars

Many cars in the United States are imported. This new law would require that 75 percent of all parts in cars sold in the United States be produced domestically.

A possible positive effect is more jobs in auto-related industries. Possible negative effects are increased consumer prices for cars and fewer U.S. exports.

Bill #3. Reduction of the Minimum Wage

Business firms can maintain a dual minimum wage standard. Workers under 21 can be paid $1 less an hour than workers over 21, even though both groups are doing the same type of work.

Possible positive effects are reduced cost of production and an increased number of employed teens. Possible negative effect includes more competition for jobs and increased unemployment for some older workers.

U - decreases; G - increases; I - decreases

Several other bills might be introduced to the students involving defense spending, welfare programs, space research or any number of other areas. As the students ponder each piece of legislation they should be made aware of the economic conditions of the nation. At the completion of the activity the students should discuss how the pressure of economic conditions might have influenced the voting on each piece of legislation.

Peter R. Senn is professor emeritus of economics and social science at Wilbur Wright College and is a field Representative of the Illinois Council of Economic Education. William J. Stepien is a history teacher and director of the merged library and computer center at the Illinois Mathematics and Science Academy.

Presidential Appointments to the Supreme Court

by WILLIAM H. REHNQUIST

Chief Justice William H. Rehnquist was a "Jurist in Residence" at the University of Minnesota Law School in October 1984; he delivered this address on October 19. It was published originally in the summer 1985 issue of *Constitutional Commentary*, a faculty-edited publication of the University of Minnesota Law School. We are grateful to *Constitutional Commentary* and to Chief Justice Rehnquist for permission to reprint this speech.

One of the proud and just boasts of the constitutional system of government that we have in the United States is that even the President is not above the law. The justness of the boast is illustrated by decisions such as the *Steel Seizure Case*, in which the Court rebuffed the claims of President Truman, and the *Nixon Tapes Case*, in which the Court rebuffed the claims of President Nixon. But, though the President, the head of the executive branch, may be subject under our system to checks and balances administered by the judicial branch of government, the courts themselves are subject to a different form of check and balance administered by the President. Vacancies in the federal judiciary are filled by the President with the advice and consent of the United States Senate. Just as the courts may have their innings with the President, the President comes to have his innings with the courts. It seems fitting, particularly in the year of a presidential election, to inquire what history shows as to the propensity of Presidents to "pack" the Court, and the extent to which they have succeeded in any such effort.

I use the word "pack" as the best verb available, realizing full well that it has a highly pejorative connotation. But it ought not to have such a connotation when used in this context; the second edition of Webster's unabridged dictionary, which happens to be the one I have in my study, defines the verb "pack" as "to choose or arrange (a jury, committee, etc.) in such a way as to secure some advantage, or to favor some particular side or interest." Thus a President who sets out to "pack" the Court seeks to appoint people to the Court who are sympathetic to his political or philosophical principles.

There is no reason in the world why a President should not do this. One of the many marks of genius which our Constitution bears is the fine balance struck in the establishment of the judicial branch, avoiding both subservience to the supposedly more vigorous legislative and executive branches, on the one hand, and total institutional isolation from public opinion on the other. The performance of the judicial branch of the United States government for a period of nearly two hundred years has shown it to be remarkably independent of the other coordinate branches of that government. Yet the institution has been constructed in such a way that the public will, in the person of the President of the United States—the one official who is elected by the entire nation—have something to say about the membership of the Court, and thereby indirectly about its decisions.

Surely we would not want it any other way. We want our federal courts, and particularly the Supreme Court of the United States, to be independent of popular opinion when deciding the particular cases or controversies that come before them. The provision for tenure during good behavior and the prohibition against diminution of compensation have proved more than adequate to secure that sort of independence. The result is that the Justices are responsible to no electorate or constituency. But the manifold provisions of the Constitution with which judges must deal are by no means crystal clear in their import, and reasonable minds may differ as to which interpretation is proper. When a vacancy occurs on the Court, it is entirely appropriate that that vacancy be filled by the President, responsible to a national constituency, as advised by the Senate, whose members are responsible to regional constituencies. Thus, public opinion has some say in who shall become Justices of the Supreme Court.

The answer to the first question I posed—have Presidents in the past attempted to "pack" the Court—is easy; the Presidents who have been sensible of the broad powers that they have possessed, and been willing to exercise those powers, have all but invariably tried to have some influence on the philosophy of the Court as a result of their appointments to that body. This should come as a surprise to no one.

The answer to the second question that I posed—how successful have Presidents been in their efforts to pack the Court—is more problematical. I think history teaches us that those who have tried have been at least partially successful, but that a number of factors militate against a President having anything more than partial success. What these factors are I will try to illustrate with examples from the history of the Court.

Very early in the history of the Court, Justice William Cushing, "a sturdy Federalist and follower of Marshall,"[1] died in September 1810. His death reduced the seven-member Court to six, evenly divided between Federalist appointees and Republican appointees. Shortly after Cushing's death, Thomas Jefferson, two years out of office as President, wrote to his former Secretary of the Treasury, Albert Gallatin, in these unseemingly gleeful words:

> I observe old Cushing is *dead*. At length, then, we have a chance of getting a Republican majority in the Supreme judiciary. For ten years has that branch braved the spirit and will of the Nation.... The event is a fortunate one, and so timed as to be a godsend to me.[2]

Jefferson, of course, had been succeeded by James Madison, who, though perhaps less ardently than Jefferson, also championed Republican ideals. Jefferson wrote Madison that "it will be difficult to find a character of firmness enough to preserve this independence on the same Bench with Marshall."[3] When he heard that Madison was considering Joseph Story and Ezekiel Bacon, then Chairman of the Ways and Means Committee of the House of Representatives, he admonished Madison that "Story and Bacon are exactly the men who deserted us [on the Embargo Act]. The former [is] unquestionably a tory, and both are too young."[4]

President Madison seems to have been "snake-bit" in his effort to fill the Cushing vacancy. He first nominated his Attorney General, Levi Lincoln, who insisted from the first that he did not want the job; even after the Senate confirmed him he still refused to serve. Madison then nominated a complete dark horse, one Alexander Wolcott, a political hack who was the Federal Revenue Collector of Connecticut. The Senate, controlled by his party, rejected Wolcott by the mortifying vote of twenty-four-to-nine. Finally, in the midst of a cabinet crisis that occupied a good deal of this time, Madison nominated Joseph Story for the Cushing vacancy, and the Senate confirmed him as a matter of routine three days later.

Story, of course, fulfilled Jefferson's worst expectations about him. He became Chief Justice Marshall's principal ally on the great legal issues of the day in the Supreme Court, repeatedly casting his vote in favor of national power and against the restrictive interpretation of the Constitution urged by Jefferson and his states'-rights school. And Joseph Story served on the Supreme Court for thirty-four years, one of the longest tenures of record.

Presidents who wish to pack the Supreme Court, like murder suspects in a detective novel, must have both motive and opportunity. Here Madison had both, and yet he failed. He was probably a considerably less partisan Chief Executive than Jefferson, and so his motivation was perhaps not strong enough. After having botched several opportunities, he finally preferred to nominate someone who would not precipitate another crisis in his relations with the Senate, rather than insisting on a nominee who had the right philosophical credentials.

The lesson, I suppose, that can be drawn from this incident is that while for Court-watchers the President's use of his appointment power to nominate people for vacancies on the Supreme Court is the most important use he makes of the executive authority, for the President himself the filling of the Supreme Court vacancies is just one of many acts going on under the "big top" of his administration.

Abraham Lincoln had inveighed against the Supreme Court's 1857 decision in the *Dred Scott* case during his famous debates with Stephen A. Douglas in 1858, when both sought to be elected United States Senator from Illinois. Lincoln lost that election, but his successful presidential campaign two years later was likewise marked by a restrained but nonetheless forceful attack on this decision and by implication on the Court's apparent institutional bias in favor of slaveholders. Within two months of his inauguration, by reason of the death of one Justice and the resignation of two others, Lincoln was given three vacancies on the Supreme Court to fill. To fill them Lincoln chose Noah Swayne of Ohio, David Davis of Illinois, and Samuel F. Miller of Iowa. All were Republicans who had rendered some help in getting Lincoln elected President in 1860; indeed, Davis had been one of Lincoln's principal managers at the Chicago convention of the Republican Party in that year.

In 1863, by reason of expansion in the membership of the Court, Lincoln was enabled to name still another Justice, and he chose Stephen J. Field of California, a War Democrat who had been the chief justice of that state's supreme court. In 1864, Chief Justice Roger B. Taney finally died at the age of 88, and Lincoln had an opportunity to choose a new Chief Justice.

At this time, in the fall of 1864, the constitutionality of the so-called "greenback legislation" that the government had used to finance the war effort was headed for a Court test, and Lincoln was very much aware of this fact. He decided to appoint his Secretary of the Treasury, Salmon P. Chase, who was in many respects the architect of the greenback legislation, saying to a confidant that

> [w]e wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known.[5]

In all, then, Lincoln had five appointments. How successful was Lincoln at "packing" the Court with these appointments? The answer has to be, I believe, that he was very successful at first. In the all-important *Prize Cases*, decided in 1863, the three Lincoln appointees already on the Court—Swayne, Miller, and Davis—joined with Justices Wayne and Grier of the old Court to make up the majority, while Chief Justice Taney and Justices Nelson, Cartron, and Clifford dissented. It seems obvious that this case would have been decided the other way had the same Justices been on the Court who had decided the *Dred Scott* case six years earlier. Charles Warren, in his *The Supreme Court in United States History*, describes these cases as being not only "the first cases arriving out of the Civil War to be decided by [the court], but they were far more momentous in the issue involved than any other case; and their final determination favorable to the government's contention was almost a necessary factor in the suppression of the war."[6]

Immediately after the war, a host of new issues arose that could not readily have been foreseen at the time that Lincoln made his first appointments to the Supreme Court. The extent to which military tribunals might displace civil courts during time of war or insurrection was decided by the Supreme Court in 1866 in the famous case of *Ex parte Milligan*.[7] While the Court was unanimous as to one aspect of this case, it divided five-to-four on the equally important question of whether Congress might provide for trial by military commissions during time of insurrection even though the President alone could not. On this point Justices Field and Davis, Lincoln appointees, joined Justices Nelson, Grier, and Clifford of the old Court to hold that neither Congress nor the President might do so, while Chief Justice Chase and Justices Miller and Swayne (all appointed by Lincoln) joined Justice Wayne of the old Court in holding that Congress might establish such courts even though the President alone could not.

During the post-war Reconstruction Era, three new amendments to the United States Constitution were promulgated, and the construction of those amendments was also necessarily on the agenda of the Supreme Court. The first important case involving the fourteenth amendment to come before the Court was that of the *Slaughterhouse Cases*, in which the applicability of the provisions of that amendment to claims not based on racial discrimination was taken up by the Court. Of the Lincoln appointees, Justice Miller wrote the majority opinion and was joined in it by Justice Davis, while Chief Justice Chase and Justices Field and Swayne were in dissent.

The ultimate irony in Lincoln's effort to pack the Court was the Court's first decision in the so-called *Legal Tender Cases*, *Hepburn v. Griswold*.[8] In 1870 the Court held, in an opinion by Chief Justice Chase, who had been named Chief Justice by Lincoln primarily for the purpose of upholding the greenback legislation, that this legislation was unconstitutional. Justice Field joined the opinion of the Chief Justice, while the other three Lincoln appointees—Miller, Swayne, and Davis—dissented. Chief Justice Chase's vote in the *Legal Tender Cases* is a textbook example of the proposition that one may look at a legal question differently as a judge than one did as a member of the executive branch. There is no reason to believe that Chase thought he was acting unconstitutionally when he helped draft and shepherd through Congress the greenback legislation, and it may well be that if Lincoln had actually posed the question to him before nominating him as Chief Justice, Chase would have agreed that the measures were constitutional. But administrators in charge of a program, even if they are lawyers, simply do not ponder these questions in the depth that judges do, and Chase's vote in the *Legal Tender Cases* is proof of this fact.

In assessing Lincoln's success in his effort to pack the Court, it seems that with regard to the problems he foresaw at the time of his first appointments—the difficulties that the Supreme Court might put in the way of successfully fighting the Civil War—Lincoln was preeminently successful in his efforts. But with respect to issues that arose after the war—the use of military courts, the constitutionality of the greenback legislation, and the construction of the fourteenth amendment—his appointees disagreed with one another regularly. Perhaps the lesson to be drawn from these examples is that judges may think very much alike with respect to one issue, but quite differently from one another with respect to other issues. And while both Presidents and judicial nominees may know the current constitutional issues of importance, neither of them is usually vouchsafed the foresight to see what the great issues of ten or fifteen years hence are to be.

Probably the most obvious laboratory test for success in packing the Court is the experience of President Franklin D. Roosevelt with his judicial appointments. Franklin Roosevelt had both motive and opportunity in abundance. He was elected President in 1932, and his first term in office was notable for the enactment of many important social and economic regulatory measures. But it seemed during these four years that no sooner were these New Deal measures signed into law by the President than they were invalidated by the Supreme Court. That Court, referred to in those days as the "Nine Old Men," had on it Justices appointed by Presidents Taft, Wilson, Harding, Coolidge, and Hoover. Though the outcomes in many cases were close, during Roosevelt's first term the Court struck down such important pieces of New Deal legislation as the NRA and the AAA.

In November 1936, President Roosevelt won a landslide reelection victory, with his Republican opponent carrying only the states of Maine and Vermont. Frustrated during his first term by the lack of any vacancies on the Supreme Court, Roosevelt disdained to wait longer for vacancies and in effect took the bull by the horns. In his famous "Court-packing plan" proposed in February 1937, he sought authority from Congress to enlarge the membership of the Court to as many as fifteen Justices; the President would have the authority to appoint an additional Justice for each member of the Court over seventy years of age who chose not to retire. This measure was shot down in flames in the Senate, a Senate that the Democrats controlled by a margin of five-to-one. But in the very course of the battle over this legislation, Justice Van Devanter, who had been appointed to the Court by President Taft in 1910, announced his intention to retire, and during the next four years there occurred six additional vacancies on the Court. The power to remake the Court, which Roosevelt had unsuccessfully sought from Congress, was given him by the operation of the actuarial tables.

There is no doubt that President Roosevelt was keenly aware of the importance of judicial philosophy in a Justice of the Supreme Court; if he had not been, he never would have taken on the institutional might of the third branch with his Court-packing plan. When it appeared during the battle in the Senate over the Court-packing bill that a compromise might be achieved in which Roosevelt would be allowed to appoint two new Justices, he pondered with several of his intimates whom he might choose, and there is little doubt that uppermost in his mind was a judicial outlook sympathetic to sustaining the New Deal legislation.

Within four years of the defeat of the Court-packing legislation, as I have indicated, seven of the nine members of the Court had been appointed by Roosevelt, and in the short run the effect of the change in Court personnel was immediate and predictable. Social and regulatory legislation, whether enacted by the states or by Congress, was sustained across the board against constitutional challenges that might have prevailed before the old Court. When Roosevelt in 1941 appointed Harlan F. Stone to succeed Charles Evan Hughes as Chief Justice, the periodical *United States News* commented that "the new head of the Court will also find no sharp divergence of opinion among his colleagues." The *Washington Post* echoed the same sentiment when it foresaw "for years to come" a "virtual unanimity on the tribunal."[9]

These forecasts proved to be entirely accurate in the area of economic and social legislation. But other issues began to percolate up through the judicial coffee pot, as they have a habit of doing. The Second World War, which occupied the United States from 1941 until 1945, produced numerous lawsuits about civil liberties. During the war, the Court maintained a fair degree of cohesion in deciding most of these cases, but quite suddenly after the war, the predicted "virtual unanimity" was rent asunder in rancorous squabbling, the like of which the Court had seldom seen before.

Some, but only some, of the differences were of judicial philosophy. Understandably, seven Justices who agreed as to the appropriate constitutional analysis to apply to economic and social legislation might not agree with one another in cases involving civil liberties. These differences manifested themselves infrequently during the war years but came into full bloom shortly afterwards. In a case called *Saia v. New York*,[10] the Court held by a vote of five-to-four that a local ordinance of the city of Lockport, New York, regulating the use of sound trucks in city parks, was unconstitutional. Four of the five Justices in the majority were appointees of Franklin Roosevelt, but so were three of the four Justices in the minority. Seven months later the Court all but overruled the *Saia* case in *Kovacs v. Cooper*,[11] with one of the *Saia* majority defecting to join the four dissenters for the *Kovacs* majority. These two cases provide but one of abundant examples of similar episodes in the Court's adjudication during the period from 1945 to 1949.

In 1949, two events of rather dramatic importance for Court-watchers, if not for the public at large, occurred within a few months of each other. In July of that year, Justice Frank Murphy died at the age of 59, after having served on the Court for ten years. In September, Justice Wiley Rutledge died at the age of 55, after having served on the Court for six years. Both of these deaths may fairly be described as untimely, and the terms of service of both Justices Murphy and Rutledge were substantially below the average for Supreme Court Justices.

Ironically, these two appointees were the most "liberal" of all the Roosevelt appointees on issues such as civil rights and civil liberties. Harry Truman, then President, replaced them with Justices Tom Clark and Sherman Minton, respectively, who had no doubts about the constitutionality of New Deal economic and social legislation, but who had quite different views of the relationship of the Constitution to civil liberties and civil rights claims from those of Justices Murphy and Rutledge. Here was an element of blind chance that frustrated at least in part the unanimity that had been predicted for the so-called Roosevelt Court: two of President Roosevelt's eight appointees died well before they might have been expected to die, permitting another President to fill the vacancies. One is reminded of the statement of William Howard Taft, speaking with newspaper reporters as he stepped down from the Presidency. Numbering among his most important presidential acts the appointment of six Justices to the Supreme Court, Taft said he had told these Justices: "If any of you die, I'll disown you."

The final factor that frustrated President Roosevelt's complete success in his effort to pack the Supreme Court was a deep personal animosity that developed among several of his appointees. It originally arose between Justice Black and Justice Jackson, but then spread to ally Justice Douglas with Justice Black and Justice Frankfurter with Justice Jackson. The first public manifestation of this animosity was buried in the minute orders denying rehearing in the *Jewell Ridge* case when the Supreme Court adjourned for the summer in June 1945. The petition for rehearing claimed that Justice Black should have disqualified himself in that five-to-four decision because it was argued by his one-time law partner; Justice Jackson's insistence upon separately stating his views as to the petition for rehearing caused a deep rift between the two Justices.

This unedifying controversy resurfaced the following spring in 1946. Chief Justice Stone died suddenly in April of that year, and President Truman delayed filling the vacancy for a number of weeks. Justice Jackson was at this time Special Prosecutor for the United States at the Nuremberg Trials of the Nazi war criminals. He had just wound up his many months' work in Germany, but had not yet returned to the United States. In early June, President Truman announced the appointment of Fred M. Vinson as Chief Justice, and four days later Justice Jackson released an unprecedented statement to the press in Europe, although it was addressed nominally to the chairmen of the House and Senate Judiciary Committees. Jackson then, responding to what he thought were inspired columns in the Washington press reflecting Black's view of the controversy over the *Jewell Ridge* case, released to the public all the gory details of that case in a light favorable to him. The reaction of the American press and public was one of astonishment that Jackson would air dirty linen in this manner, and of "a plague on both your houses" insofar as the Black-Jackson "blood feud" was concerned.

Jackson and his ally, Frankfurter, had voted differently from Black and his ally, Douglas, in some of the cases to come before the Court before the *Jewell Ridge* controversy, but one cannot help wondering whether the bitter public antagonism generated by that case exacerbated these differences. The expected "near unanimity" that the Roosevelt appointees were supposed to bring to the Court was frustrated by these antagonisms as well as by the other factors that I have mentioned.

Thus history teaches us, I think, that even a "strong" President determined to leave his mark on the Court—a President such as Lincoln or Franklin Roosevelt—is apt to be only partially successful. Neither the President nor his appointees can foresee what issues will come before the Court during the tenure of the appointees, and it may be that none has thought very much about these issues. Even though they agree as to the proper resolution of current cases, they may well disagree as to future cases involving other questions when, as judges, they study briefs and hear arguments. Longevity of the appointees, or untimely deaths such as those of Justice Murphy and Justice Rutledge, may also frustrate a President's expectations; so also may the personal antagonisms developed between strong-willed appointees of the same President.

All of these factors are subsumed to a greater or lesser extent by observing that the Supreme Court is an institution far more dominated by centrifugal forces, pushing towards individuality and independence, than it is by centripetal forces pulling for hierarchial ordering and institutional unity. The well-known checks and balances provided by the framers of the Constitution have supplied the necessary centrifugal force to make the Supreme Court independent of Congress and the President. The degree to which a new Justice should change his way of looking at things when he "puts on the robe" is emphasized by the fact that Supreme Court appointments almost invariably come "one at a time," and each new appointee goes alone to take his place with eight colleagues who are already there. Unlike his freshman counterpart in the House of Representatives, where if there has been a strong political tide running at the time of a particular election there may be as many as forty or fifty new members who form a bloc and cooperate with one another, the new judicial appointee brings no cohorts with him.

A second series of centrifugal forces is at work within the Court itself, pushing each member of the Court to be thoroughly independent of his colleagues. The Chief Justice has some authority that the Associate Justices do not have, but this is relatively insignificant compared to the extraordinary independence that each Justice has from every other Justice. Tenure is assured no matter how one votes in any given case; one is independent not only of public opinion, of the President, and of Congress, but of one's eight colleagues as well. When one puts on the robe, one enters a world of public scrutiny and professional criticism which sets great store by individual performance, and much less store upon the virtue of being a "team player."

James Madison, in his pre-presidential days when he was authoring political tracts, said:

> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.[12]

Madison, of course, was talking about the principles necessary to secure independence of one branch of the government from another. But he might equally well have been talking about principles, at least in the case of the Supreme Court of the United States, designed to weaken and diffuse the outside loyalties of any new appointee, and to gradually cause that appointee to identify his interests in the broadest sense not merely with the institution to which he is appointed, but to his own particular place within the institution. Here again, this remarkable group of fifty-some men who met in Philadelphia in the summer of 1787 seems to have created the separate branches of the federal government with consummate skill. The Supreme Court is to be independent of the legislative and executive branches of the government; yet by reason of vacancies occurring on that Court, it is to be subjected to indirect infusions of the popular will in terms of the President's use of his appointment power. But the institution is so structured that a brand new presidential appointee, perhaps feeling himself strongly loyal to the President who appointed him, and looking for colleagues of a similar mind on the Court, is immediately beset with the institutional pressures that I have described. He identifies more and more strongly with the new institution of which he has become a member, and he learns how much store is set by his behaving independently of his colleagues. I think it is these institutional effects, as much as anything, that have prevented even strong Presidents from being any more than partially successful when they sought to "pack" the Supreme Court.

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1. N. Schachner, *Thomas Jefferson: A Biography* 901 (1951).
2. *Id.*
3. G. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* 77 (1970).
4. *Id.* at 78–79.
5. 2 C. Warren, *The Supreme Court in United States History* 401 (1922).
6. *Id.* at 380–81.
7. 71 U.S. (4 Wall.) 2 (1866).
8. 75 U.S. (8 Wall.) 603 (1870).
9. A. Mason, *Harlan Fiske Stone: Pillar of the Law* 576 (1956).
10. 334 U.S. 558 (1948).
11. 336 U.S. 77 (1949).
12. *The Federalist* No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

The Northwest Ordinance: America's Other Bicentennial

by Phillip R. Shriver

The following piece is excerpted from "America's Other Bicentennial" by Philip R. Shriver, which appeared originally in The Old Northwest: A Journal of Regional Life and Letters, *vol. 9, no. 3, fall 1983. We are grateful to* The Old Northwest *and to Miami University, Oxford, Ohio, its publisher, for permission to reprint.*

MENTION the word "bicentennial" today to many Americans and there is evoked a mélange of memories of Main Street parades, tall ships, a sky full of fireworks, and a shelf full of John Jake's novels. Yet for all the superficial hoopla, celebrations across the land on the Fourth of July 1976 anniversary of the Declaration of Independence stirred national pride in a decade which provided little else for the nation to be proud about.

Mention that same word "bicentennial" to a gathering of historians and, after some wry smiles, the reaction probably would be as much anticipatory as reflective. For as the nation approaches the seventeenth of September 1987 and the two-hundredth anniversary of the signing of the Constitution, preparations are already well underway within the Congress and among a number of historical associations for suitable recognition in an atmosphere less likely to be prone to sideshows than the main event. Indeed, significant scholarly writing on the subject of the Constitution already has quickened, as the proliferation of recent journal articles will attest. At the same time, the welcome enthusiasm of the past decade for serious research and writing on the American Revolution and the Declaration of Independence has not entirely subsided among historians, nor will it.

Yet America also has a third major bicentennial in the offing which thus far largely has been ignored, and it is about this one that I want to speak today. I am referring to the approaching bicentennial of the Northwest Ordinance of 1787. My thesis is this: of the literally hundreds of documents in our history that deserve to be called significant, only a handful can be called fundamental; and of these, the three most fundamental to the formation of the nation were the Declaration of Independence, the Constitution, and the Northwest Ordinance. Accordingly, I believe that the two-hundredth anniversary of the great Ordinance merits appropriate recognition and celebration, here in this state (its first fruit) and across the land.

I shall admit at the outset that in terms of name recognition and general understanding the Ordinance does not begin to compare with the first two. Indeed, even among college students, if the blue books I have graded over the years are any indication, the Ordinance is not always readily identified or its significance understood. Adopted by the Congress in New York on the thirteenth of July 1787 near the close of the period of Confederation, even as delegates had assembled at Philadelphia to create a new constitution, it established a government for the territory north and west of the river Ohio and a plan by which a territory could become a state on an equal footing with states already in the Union. In retrospect, it was the most magnanimous colonial policy the world had ever seen. In six articles of compact, it provided the first bill of rights, anticipating the amendments which would later be added to the Constitution. Guaranteed to those who would leave their homes in the settled East and cross the mountains into frontier wilderness were religious freedom, the historic safeguards of jury trial and judicial procedure, the writ of habeaus corpus, the prohibition of primogeniture, the establishment of schools and encouragement of education, and freedom forever from slavery and involuntary servitude. By this last provision, the celebrated Article VI, the Ohio River became the historic boundary between free soil and slave. . . .

In . . . recent decades, . . . historians of the Ordinance have found it key to an understanding of the emergence of our continental nation. Frederick Merk of Harvard has noted that "The United States is today a republic of 50 equal partners. Of the 50, 31 have come into the Union under the principles of the Northwest Ordinance of 1787." [Ray Allen] Billington in his book on *Westward Expansion* has asserted that "the Ordinance of 1787 did more to perpetuate the Union than any document save the Constitution. Men could now leave the older states assured they were not surrendering their political privileges. Congress had not only saved the Republic, but had removed one great obstacle to the westward movement." In an article presented at the 1974 conference of the Western History Association, engagingly entitled "The Continental Nation—Our Trinity of Revolutionary Testaments," John Porter Bloom has argued that the Declaration of Independence, the Constitution, and the Northwest Ordinance together constitute the "Trinity of Revolutionary Testaments" which "proposed a certain course for the nation to follow" and which have given the American people an "historic sense of direction" over "two centuries of national experience. . . ."

Given all of the generally positive comment about the extraordinary historical significance of the Northwest Ordinance by so many historians over so long a period of time, one is moved to ask why it has suffered so much relative neglect from the general public when compared with the adulation heaped on its revolutionary counterparts, the Declaration of Independence and the Constitution. Four basic answers come to mind:

The first is the incredibly complex, unappealing, and legalistic style in which much of it was written, a fault not shared by the other two documents. Though Congress had considered the measure for more than three years, it was modified extensively and completed in haste in a single week, 6-13 July 1787. Quite simply it reflects the haste in which it was written.

Second, it had no primary authors of first rank to give it stature and nobility. The immortality of a Thomas Jefferson, an Alexander Hamilton, or a Benjamin Franklin would not embrace this document as the Declaration and the Constitution were embraced. Instead, the Ordinance was the creature of a succession of committees, principal figures of which were men of lesser rank, such as Nathan Dane and Rufus King, neither of whom had a penchant for lofty political philosophy.

Third, the Ordinance was the product of a dying Congress scarcely able to function under the ineffective and tormented Articles of Confederation. This contrasted sharply with the excitement attending the birth of a *new* nation with the Declaration of Independence and the birth of a *new* government under the Constitution of the United States.

Fourth, the Ordinance was tarnished by the spectre of speculation. The principal reason for its passage in July 1787 was the near bankruptcy of the federal treasury and the availability of ready cash from speculative land companies ready to take advantage of that distress by negotiating the purchase of great chunks of the public domain for pennies on the acre once government in the territories had been established. Profit may not be a dirty word in Ohio in 1983, but it has never been altogether respectable in the minds of many when that profit was associated with the use of public property. Consequently, the Ordinance has never had quite the aura of idealism and virtue about it that has been associated with the Declaration or the Constitution. . . .

Why then in the light of all its many shortcomings—its faulty language, the near obscurity of its authors, its enactment by a moribund Congress in collusion with conniving speculators—why then, we might ask, do we find historians generally agreed on its greatness, "its abiding place of honor [among] American institutions"? [Theodore Calvin] Pease suggests that for all its faults the Ordinance will be "a precious part of the world's heritage in distant ages to come" because it embodied an *idea*, the idea "that men may not permanently by their brothers be held in political subordination and clientage; . . . that the highest and most sacred guarantee, the most practical and stable cement of states and governments is the free and unforced covenant and agreement of man and man." Bruce Catton, in a final work published posthumously by his son, William, entitled *The Bold and Magnificent Dream*, caught that same vision when he wrote of the Ordinance: "Once and for all, it determined what sort of country this was going to be; the concept of complete equality, so nobly voiced in the Declaration [of Independence], was written into the basic document that would determine how the nation grew. It compelled men to look past their own dooryards to something unlimited beyond the horizon, and decreed that a man's place as a member of the American Republic would be forever greater than his place as a resident of a single state. . . ."

Will the historians of *this* state, the first fruit of the great Ordinance, the embodiment of that idea, of that vision, take the lead in recognizing and appropriately celebrating America's *other* bicentennial? My hope is that such will be the resolve of each one, and of us all, as we look to the year and years ahead.

For more information about the Northwest Ordinance Bicentennial commemoration, contact:

NORTHWEST ORDINANCE CELEBRATION
Frank B. Jones, Chairman
Mary Helm, Exec. Asst.
Indiana University
Memorial Union M-17
Bloomington, IN 47405
(812) 335-5394

NORTHWEST ORDINANCE SOCIETY
Judge Gerald E. Radcliffe
Ross County Courthouse
Chillicothe, Ohio 45601
(614) 774-1177

Bicentennial Gazette

PLANNING A CONFERENCE FOR HIGHER EDUCATION

By Richard Peterson

If you are planning events for the bicentennial, it may surprise you to know that one of the most useful and relevant conferences might just turn out to be the easiest to implement—a conference on the role of higher education in the bicentennial. Not only will you have an audience of the "already converted," but you will also have the advantage of hearing from people experienced in educating others about a subject as lofty but as pervasive as the Constitution.

You will probably find that many of the colleges in your state are already well into developing plans for celebrating the Constitution. Hence, this conference will provide you with an overview of what is going on in your state, and, further, you will uncover new resources of speakers and experts whose interests range over diverse aspects of the Constitution and its historical development.

The Virginia Bicentennial Commission held its own conference on higher education on September 30, 1986, at the beginning of the academic year. We used the facilities of the University of Virginia. We were lucky enough to begin with lively remarks from Virginia's Governor Gerald L. Baliles, our keynote speaker. Naturally a wider audience of students and the press attended the governor's talk.

The group then adjourned to less public quarters, and two members of the federal commission spoke. Dr. Lane Sunderland, Director of Educational Programs for the Federal Commission, and Professor Leo Levin, Director of the Federal Judicial Center, brought those assembled up to date on federal efforts in higher education and offered ideas on how to tap into their resources, such as speakers and materials.

After a luncheon address from A.E. Dick Howard, chairman of Virginia's Bicentennial Commission, the afternoon session was devoted to a discussion among the representatives about their plans to celebrate the bicentennial. While the format of many plans was similar—symposia with visiting scholars, debates, and participatory meetings—the range of issues and topics was as broad as the number of colleges represented. Some have foreign visiting scholars in residence, who are available as guest speakers to other colleges. A few of the colleges are making exemplary efforts to reach out to the public at large, including high schools and elementary schools. Participants included: the College of William and Mary, James Madison University, George Mason University, Mary Baldwin College, Virginia State University, CBN University, Longwood College, Norfolk State University, Clinch Valley College, Tidewater Community College, Virginia Commonwealth University, Northern Virginia Community College, Hollins College, Radford University, Washington and Lee University, Bridgewater Community College, the University of Virginia, the Virginia Polytechnic Institute, and Christopher Newport College.

For the benefit of those who may have little experience in conference planning, here are a few pointers that will help your conference run smoothly. We thought of some of these things only at the last minute. This section will also give you an indication of how little time and money one needs to carry it off. Perhaps it is worth mentioning here that one of the greatest concerns of those planning a conference is the *content* of the conference. In this case, the time and worry associated with this task is alleviated by the fact that the content will be determined by the invited participants.

1. *Obtaining the meeting facility.* While a college is the most natural setting for a conference of this nature, you may find that none is convenient for your speaker and the majority of your participants. If you cannot afford the facilities of a private hotel, why not ask civic minded groups such as churches

and the Elks to donate space? Some even have dining facilities, which is a major consideration. The total cost for meeting rooms, lunch, and coffee for our 50 guests was $481.00.

2. *Obtaining a guest speaker(s).* Past and present public officials, such as state attorney generals, judges, and members of state and national legislatures, make excellent speakers. Not only are they committed to promoting constitutional awareness, but also they often have a practical and interesting perspective on the Constitution that has been gained from specific issues with which they have struggled. Usually they will not require an honorarium, though you are expected to pay for their expenses. Your audience of scholars is accustomed to hearing other scholars speak and is likely to appreciate the immediacy with which a public official deals with the Constitution.

3. *Publicizing the conference.* This effort includes mailing a form letter to all of the institutions of higher education in your state inviting them to attend the conference. You may also want to send out a press release. You should publicize your conference and star speaker in campus and/or local private newspapers and radio. Depending on the appeal of your major speaker, this will provide for a broader audience for at least part of your conference, and at any rate it is good to let the world know what your commission is doing.

4. *Providing name tags and other conference handouts.* The fewer handouts, the less effort required on the part of the planners. Just remember that handouts, including a list of attendees and a program, enhance any conference—and educators almost expect them. Fortunately you may find, as we did, that some colleges bring their own handouts. Since your guest list will not be finalized until the last minute—trust me, professors have constant scheduling problems—be prepared to be up late the night before the conference finalizing the list of attendees and making name tags.

5. *Little but critical details.* Lodging—while you may not be paying for or arranging lodging for those invited, you must know the motels best suited to those attending and whether they are available, because you will get inquiries. Of course you should make all the arrangements for your speaker. Parking—you may need to obtain special permits and mail them to the conferees in advance. Maps—you must send everyone a map explaining the location of the events, parking, dining, and lodging. Agenda—in addition to a map, you must mail a program of the day's agenda to everyone who accepts the invitation. The program and the map must be clear enough for those who cannot attend the entire day's events but must select a portion of the program. Audio/visual taping equipment—you will probably want to have it on hand.

6. *Post-conference effort.* You may or may not want to send minutes of the conference to attendees and those who could not attend, but were invited. Those who decline often request any handouts that were provided to attendees.

Good luck on your conference. We felt the return on our investment in time and money was well worth it. Not only did we on the Commission staff learn of higher education's plans, but those colleges which had not focused on the effort to date became involved in celebrating the Constitution.

Richard Peterson is on the staff of the Virginia Bicentennial Commission.

THE NATIONAL ENDOWMENT FOR THE HUMANITIES

Special Initiative for the Bicentennial of the United States Constitution

Summer Stipends (February 1986)

Ronald J. Bacigal
University of Richmond
Richmond, VA 23173
The Origin and Nature of the Fourth Amendment to the United States Constitution

Michal R. Belknap
University of Georgia
Athens, GA 30602
War and the United States Constitution in the 20th Century

Michael L. Benedict
Ohio State University
Columbus, OH 43210
Civil Liberty and Civil Rights in the U.S.

Stephen A. Conrad
Indiana University
Bloomington, IN 47405
Authority and Power in James Wilson's Constitutional Theory

Harry N. Hirsch
Harvard University
Cambridge, MA 02138
Constitutional Liberty in the Age of Equality: Marginal Persons and the Liberal Self

Peter C. Hoffer
University of Georgia
Winterville, GA 30683
Historical Origins of Federal Equity Jurisdiction

David E. Kyvig
University of Akron
Akron, OH 44325
Constitution Amending in the Early 20th Century

John L. Larson
Purdue University
West Lafayette, IN 47907
Technology, Innovation, and Constitutional Legitimacy in the Early United States

H. L. Pohlman
Carlisle, PA 17013
Justice Oliver Wendell Holmes's Constitutional Theory

David A. Sloan
University of Arkansas
Fayetteville, AR 72701
Constitutionalism, Popular Sovereignty, and the State Making Process: The Examples of Ohio and Arkansas

Lane V. Sunderland
Knox College
Galesburg, IL 61401
Contemporary Constitutional Commentators: An Analysis of Contending Theories

Robert J. Spitzer
SUNY-Cortland
Cortland, NY 13045
The Presidential Veto

Summer Seminars (August 1986)

THE FEDERALIST AND THE CONSTITUTION
Peter J. Galie
Canisius College
Buffalo, NY 14208
Award: $62,308

THOMAS JEFFERSON: THE INTELLECTUAL ON MISSION
Robert F. Jones
Fordham University
Bronx, NY 10458
Award: $54,905

REPUBLICANISM AT THE FOUNDING: THE FEDERALIST-ANTIFEDERALIST DEBATE
Gordon Lloyd
University of Redlands
Redlands, CA 92374
Award: $60,254

THE HUMANITIES AND THE CIVIC SELF
William F. May
Southern Methodist University
Dallas, TX 75275
Award: $69,370

JOHN LOCKE AND THE PHILOSOPHICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION
Theodore E. Uehling, Jr
University of Minnesota, Morris
Morris, MN 56267
Award: $57,409

Education Programs (August 1986)

OKLAHOMA STATE UNIVERSITY, STILLWATER
Stillwater, OK 74078
Project Director: Carolyn J. Bauer
Award: $150,000
To support a four-week residential institute on the origins and principles of the U.S. Constitution for elementary and junior high school teachers. Follow-up workshops will be held in the fall and spring.

UNIVERSITY OF OKLAHOMA
Norman, OK 73019
Project Director: Paul A. Gilje
Award: $64,941
To support the establishment of a program of adult seminars for non-traditional learners. The seminars will focus on the historical, philosophical, and cultural context of the U.S. Constitution.

Bicentennial Seminars for Law Professors (August 1986)

The Genius of the American Constitution
Timothy Fuller
Colorado College
Colorado Springs, CO 80903
Award: $59,274
To support a three-week seminar for law professors on the intellectual background of the Constitution, the debates at the Convention and in the states over ratification, and contemporary issues in interpretation.

The Origins of Constitutional Supremacy
William E. Nelson
New York University
New York, NY 10003
Award: $65,810
To support a three-week seminar for law professors on the origins of the concept of the Constitution as a law superior to ordinary legislation.

Political Experience and Thought in the Making of the Constitution
Jack Rakove
Stanford University
Stanford, CA 94305
Award: $54,165
To support a three-week seminar for law professors on the range of issues that arise in the historical interpretation of the framing of the U.S. Constitution.

Programs in Libraries (February 1986; August 1986)

AMERICAN LIBRARY ASSOCIATION
Chicago, IL 60611
Project Director: Peggy Barber
Award: $270,172
To support a tour of three facsimiles of the New York Public Library's exhibition of the drafting and ratification of the U.S. Constitution. The exhibition will travel to 30 sites over an 18-month period and will include interpretative programs and education packages.

INDIANA UNIVERSITY ALUMNI ASSOCIATION
Bloomington, IN 47405
Project Director: Frank B. Jones
Award: $125,000
To support an interpretive exhibition, catalogue, brochures, and public lectures during the bicentennial of the Northwest Ordinance and the U.S. Constitution.

NEW ENGLAND LIBRARY ASSOCIATION
Acton, MA 01760
Project Director: Leah Glasser
Award: $245,444
To support a series of programs focusing on the framing of the U.S. Constitution and on the character of 18th-century New England. The programs will take place in six states and use three formats: scholar-led book discussions, a dramatic presentation with discussion, and musical performance with lectures.

Media Programs (August 1986)

CALLIOPE FILM RESOURCES, INC.
Somerville, MA 02144
Project Director: Randall Conrad
Award: $10,100
To support additional scripting work on an NEH-supported 90-minute television drama that will illumine the post-Revolutionary clash between New England farmers and merchants known as Shays' Rebellion (1786-1787).

DELAWARE DIV. OF HISTORICAL & CULT. AFFAIRS
Dover, DE 19901
Project Director: John R. Kern
Award: $15,000
To support the revision of a script and some pre-production costs for a 90-minute film dramatizing the life of John Dickinson (1732-1808), a significant political essayist of the 1760s and a key figure in the debates surrounding the creation of the United States Constitution.

KCET/COMMUNITY TV OF SOUTHERN CALIFORNIA
Los Angeles, CA 90027
Project Director: David Crippens
Award: $40,000
To support the writing of scripts for two 60-minute television programs exploring the history, principles, and promise of the American federal system of government.

Research (May 1986)

CUNY RES. FDN./QUEENS COLLEGE
Flushing, NY 11367
Project Director: John Catanzariti
Award: $168,005
To support the preparation of a nine-volume edition of the papers of Robert Morris and the Office of Finance (1781-1784).

(Dates refer to awarding of grant, not to date of program.)

SCHOLARLY CONFERENCES

THE CONSTITUTION TWO HUNDRED YEARS LATER: IS IT WORKING?

University of Dayton
Dayton, OH 45469-0001
September 1986—March 1987
Principal speaker: Gerald R. Ford
Topics: Right to Privacy; Equality; Separation of Powers; Future of Constitutional Government.
For further information, contact:
Roberta Alexander
History Dept.
University of Dayton
Dayton, OH 45469-0001
(513) 229-1848

THE SOUTH AND THE AMERICAN CONSTITUTIONAL TRADITION

University of Florida
Gainesville, FL 32611
March 6-7, 1987
Principal speaker: Herman Belz, University of Maryland.
Topics: The Origins of Southern Constitutionalism; Research in Southern Constitutional History; The View of Constitutional Government from the Bench; Race and Dissent in the Constitutional History of Florida; The Confederate and Reconstruction Experience; The South in Comparative Constitutional Perspective.
For further information contact:
Ms. Elizabeth B. Monroe
Editorial Assistant
Law and Society Review
College of Law
University of Florida
Gainesville, FL 32611
(904) 392-2211

THE U.S. CONSTITUTION, PAST AND PRESENT: A BICENTENNIAL COLLOQUIUM

Purdue University Calumet
Hammond, IN 46323
November 8, 1986
Principal speaker: Robert Wiebe, Northwestern University
Topic: Intent of the Founders: A Citizen's Concern and a Teacher's Challenge.
For further information, contact:
Edward P. Keleher
Department of History
Purdue University Calumet
Hammond, IN 46323

CONFERENCE IN CELEBRATION OF THE BICENTENNIAL OF THE CONSTITUTION

Loop College
Chicago, IL 60601
March 20-21, 1987
Topics: The "Interest of the Framers"; Teaching the Constitution; The Burger Court; "Fixing" the Constitution.
For more information contact:
Prof. Gloria Carrig,
Social Science Dept.
Loop College, 30 East Lake St.
Chicago, IL 60601
(312)984-2810 ext. 2913

of Chriſtopher Marſhall and Thomas Say.

Courtesy of The Library Company of Philadelphia.

200 YEARS OF THE U.S. CONSTITUTION: A CELEBRATION

The Franklin Pierce Law Center
Concord, NH 03301
March 23-26, 1987
For more information contact:
John C. Gregory, Jr.
Franklin Pierce Law Center
Constitution Bicentennial Celebration Committee
2 White Street
Concord, NH 03301

DESIGN AND PRACTICE: THE CONSTITUTION AS A WORKING DOCUMENT—A DARTMOUTH BICENTENNIAL SERIES

Dartmouth College
Hanover, NH 03755
Oct. 21, 1986: The Future of Federalism: If not Big Government, Then Big States
Nov. 21, 1986: The Ability of the President and Congress to Provide a Coherent Monetary Policy
Jan. 27, 1987: The Concept of Equality and Affirmative Action
Feb. 17, 1987: The Presidency & the Conduct of Foreign Policy
April 21, 1987: The Supreme Court's Agenda
May 5, 1987: Legislative Responsibility: The Ability of Congress to Govern
For further information contact:
Laura Dicovitsky
Dartmouth College, News Service
Centurion Bldg
3 Lebanon St
Hanover, NH 03755
(603) 646-3661

"CONSTITUTIONAL ROOTS, RIGHTS AND RESPONSIBILITIES," THE NINTH INTERNATIONAL SMITHSONIAN SYMPOSIUM COMMEMORATING 200 YEARS OF THE U.S. CONSTITUTION

Charlottesville, Va. & Washington, D.C. May 18-23, 1987
Sponsored by the Smithsonian Institution in cooperation with the American Bar Association and the University of Virginia
Principal speakers: A.E. Dick Howard, University of Virginia; Justice William Brennan; Henry Steele Commager, Amherst College; Merrill Peterson, University of Virginia; Robert Palmer, Yale University; Judith Shklar, Harvard University; Jack Green, Johns Hopkins University; Michael Kammen, Cornell University; Robert Coles, Harvard University; Ernest Boyer, Carnegie Foundation; Sanford Levinson, Princeton University; Walter Dellinger, Duke University.
Topics: the evolution of citizen rights and responsibilities; privacy, censorship, and surveillance; impact of technology; Constitution's influence abroad; amending the Constitution; judicial review. May 22 will be devoted to citizenship and the Constitution.
For additional information, contact Neil Kotler, Smithsonian Institution, (202) 357-2047 or (202) 357-2328.

INTERNATIONAL CONFERENCE ON THE UNITED STATES CONSTITUTION ITS BIRTH, GROWTH AND INFLUENCE IN ASIA

The American Studies Association of Hong Kong, The Chinese Univ. of Hong Kong and Hong Kong Baptist College
Kowloon, Hong Kong
June 25-28, 1986
Principal speakers: Ret. Chief Justice Warren E. Burger; Michael Kammen, Cornell University; Justice Shirley Abrahamson, Wisconsin Supreme Court; Akira Iriye, University of Chicago.
Topics: the ideological origins of the Constitution; the "Living Constitution"; the influence of the U.S. Constitution in Asia.
For further information contact:
J. Barton Starr, Chairman
U.S. Constitution Conference
c/o Department of History
Hong Kong Baptist College
224 Waterloo Road
Kowloon, Hong Kong

ORGANIZATIONS and INSTITUTIONS

Iroquois Contributions to the United States Constitution

Americans for Indian Opportunity and "The Meredith Fund" have united to sponsor a research program into Native American political theories and their relation to the U.S. Constitution. The project has been granted official recognition from the Bicentennial Commission. For more information, write: AIO, 1010 Massachusetts Avenue, N.W. #200, Washington, D.C. 20001; telephone: (202) 371-1280.

Colonial Williamsburg Plans Bicentennial Events

Colonial Williamsburg's first annual history forum for the general public will be held November 19–21, 1987. Entitled "The Constitution Makers: Colonial Constitutions 1750-1784," the forum will focus on the events and ideas that led to the U.S. Constitution. Topics include republican traditions, practices of colonial governments and the imperial constitution, American state constitutions, and the Articles of Confederation. Special tours of Colonial Williamsburg as well as eighteenth-century entertainment will complete the three-day program. For more information contact Registrar, History Forum, Colonial Williamsburg, P.O. Box C, Williamsburg, VA 23187; (804)229-1000.

In addition, Colonial Williamsburg will offer a two-hour walking tour on Wednesday and Fridays, March 15-August 31, 1987, 10:30 a.m. The tour will explore the links between eighteenth-century Williamsburg and the U.S. Constitution.

Constitution 200 Mounts Public Assemblies

Five public assemblies in Georgia, Alabama and South Carolina focused on rights of criminals and victims, education, religion, voting rights and privacy in 1986. Held by Constitution 200, a project of the Governmental Education Division of the Carl Vinson Institute of Government at the University of Georgia, the assemblies offer a panel of community leaders and a dialogue between speakers and the audience. Additional meetings will take place in 1987. Constitution 200 is funded by the National Endowment for the Humanities; it works with the Bureau of Governmental Research and Services at the University of South Carolina and the Alabama Law Institute at the University of Alabama. For more information, contact: Mary Hepburn, Carl Vinson Institute of Government, Athens, GA 30602; telephone: (404) 542-2736.

Symposium at the Capitol

The United States Capitol Historical Society will sponsor a symposium entitled " 'To Form a More Perfect Union': The Critical Ideas of the Constitution" on March 26 and 27, 1987. The meeting will be held in the Senate Caucus Room, SR-325, in the Russell State Office Building, Washington, D.C. The program will consist of four sessions and a concluding lecture, followed by a reception. Speakers will include Herman Belz, James MacGregor Burns, John P. Diggins, Edward J. Erler, James H. Hutson, Calvin C. Jillson, Isaac Kramnick, Ralph Lerner, Edmund S. Morgan, Jennifer Nedelsky, Peter S. Onuf, J.R. Pole, Jack N. Rakove, and Jean Yarbrough. All proceedings, including the reception, will be open to interested persons free of charge, and no advance registration is required. For additional information, write: Professor Ronald Hoffman, Department of History, University of Maryland, College Park, Maryland 20742.

New-York Historical Society Plans Exhibit

On September 17, 1987, The New-York Historical Society will open a major exhibition to celebrate the two hundredth anniversary of the United States Constitution. The exhibit is titled: "Government by Choice: Inventing the United States Constitution."

The exhibit will include, for example, an important eyewitness account of the writing of the Constitution, that of Rufus King, a delegate who participated in the secret debates; one of the extremely rare existing original manuscripts of *The Federalist*; and the actual correspondence between James Madison and the other founders as they agonized over the issues that divided Federalists and Anti-Federalists. A handwritten preliminary draft of the Constitution with the last minute changes that the founders made before revealing their plan to the nation, the chair in which President-elect George Washington was seated during his inauguration, the desk used by the first Speaker of the House of Representatives, and many other compelling memorabilia will be included in the exhibit.

A self-guided tour using acoustiguide tapes and earphones is being professionally prepared for use by visitors. For school children, a range of appropriate tours, activity books and workshops will be offered. Saturday lectures are being planned for New York City junior and senior high school teachers to prepare them for class trips to the exhibit.

The guest curator for the exhibition, Dr. Elizabeth P. McCaughey, is preparing a catalogue, which will include a fifty page interpretive account of the Federal Convention, an annotated list of the 193 items displayed, and some forty photographs.

The Society will devote its 1987 fall lecture series to timely constitutional issues. Five Wednesday evening lectures are planned and distinguished public figures and scholars will speak on topics such as 'Federalism: The Persistent Struggle for Power," "Judicial Decision Making and Judicial Appointments," and "The Media and the First Amendment."

For further information, contact Deborah Nadler, New-York Historical Society, 170 Central Park West, New York, N.Y. 10024-5194; telephone: (212) 873-3400.

NCCJ to Commemorate Constitutional Bicentennial

The National Conference of Christians and Jews is undertaking a nationwide effort to get Americans of all ages, backgrounds and walks of life to "sign" the Constitution.

Through its national network of 75 regional offices, the Conference would seek to mobilize the public to sign their names to constitutional facsimilies that will be provided by NCCJ for the Bicentennial celebration of the Constitution.

The "signed" constitutions will be returned to NCCJ for presentation to the appropriate officials in Philadelphia at the Bicentennial Commission parade and celebration on September 17, 1987, the 200th anniversary of the signing of the U.S. Constitution.

The "sign the Constitution" commemorative effort is the first phase of an NCCJ five-year concept which coincides with the 200th anniversary of the process through which the Constitution, including the Bill of Rights, was drafted and ratified.

There are two major components of the NCCJ's Living Constitution Project: curriculum enrichment for elementary and secondary schools, and Constitution learning activities for civic and adult groups.

NCCJ curriculum enrichment materials focus on constitutional considerations. The learning models are designed for various age levels. An "idea bank" of additional suggested activities also has been created.

Many of the NCCJ materials designed for students also are appropriate for individuals in other settings. They include civic, service and fraternal groups, churches, synagogues and other religious congregations, non-school youth groups, colleges and universities.

For further information, write: NCCJ, 71 Fifth Ave., N.Y., N.Y. 10003; telephone: (212) 206-0006.

University of North Dakota joins with High Schools for Bicentennial Program

As its contribution to the Bicentennial Celebration of the U.S. Constitution in 1987, the University of North Dakota — through the Bureau of Governmental Affairs — is coordinating a statewide program for high school students involving basic learning and competitive events.

Professors Ronald Pynn, Phil Harmeson and Lloyd Omdahl have prepared a fifteen-lesson paperback text on the origin and contents of the Constitution for use in high schools. A teacher's manual, including various kinds of learning exercises and projects, supplements the text.

After students have engaged in study of the Constitution, they will be prepared to participate in a number of competitive events, including short-answer tests, essay competitions, art, debate, oratory, reading, drama, poetry and journalism events.

State competition will take place at the University of North Dakota March 15–17, 1987. For further information, write: Bureau of Governmental Affairs, Box 7167, University of North Dakota, Grand Forks, ND 58202; telephone: (701) 777-3041.

Burger, Scalia Address Conference at Macalester College

On September 11–12, 1986, Macalester College presented the DeWitt Wallace Conference on the Liberal Arts. This year's theme, "The Constitution, Freedom of Expression and the Liberal Arts," was chosen in recognition of the Bicentennial of the Constitution.

Retired United States Chief Justice Warren Burger, Chairman of the Commission of the Bicentennial of the Constitution of the United States, gave the opening address. Antonin Scalia, Supreme Court Associate Justice, and Norman Dorsen, president of the American Civil Liberties Union, led formal discussions on freedom of speech issues.

Other speakers in the two-day program included Harry Gray, professor of chemistry, California Institute of Technology, John Wideman, novelist and professor of English, University of Wyoming, Robert Jay Lifton, Distinguished Professor of psychiatry and psychology, City University of New York, and Mary Beth Norton, professor of history, Cornell University. Their presentations considered freedom of expression issues in each of their four disciplines.

For further information, contact Warren Vollmar, Macalester College, 1600 Grand Avenue, St. Paul, MN, 55105; telephone: (612) 371-5504.

National Park Service Slide Show Available

The National Park Service has produced a new 16-minute sound/slide show on the Bicentennial of the Federal Constitution entitled "Blessings of Liberty." A succinct and graphic account of the framing of the original document and subsequent amendments, the show draws on the Nation's parks, monuments, and historic sites beginning with Independence National Historic Park in Philadelphia. Many of these places, like Independence Hall, mark turning points in the nation's history and are preserved as part of the National Park System.

The student who wishes to visit the surviving places associated with the story of the Constitution or read further on the subject should know of two recent publications by the National Park Service, "Signers of the Constitution: Historic Places Commemorating the Signers of the Constitution" and "Framing of the Federal Constitution." These can be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. Copies of the sound/slide show are available through the National Audiovisual Center, 8700 Edgewater Driver, Capital Heights, Maryland 20743-3701; (301)763-1896.

Scripts for Radio Spots on Constitution Now Available

Fifty-two scripts written by political scientist Walter B. Mead, a series called "The United States Constitution: A Non-Trivial Pursuit," tell the story of the Constitutional Convention in the summer of 1787. They are available for use by schools or local radio stations. Designed as a series of public service announcements, these two-minute scripts have been recognized as a "valuable contribution" by the American Bar Association. Topics include: the Articles of Confederation, Shays' Rebellion, Washington's decision to attend the Convention, Philadelphia in 1787, profiles of the delegates, the role of commerce, decisions about representation, opposition to the Constitution, ratification, and many other themes.

To obtain information about production or to order a complete set of scripts, send $5.95 ($4.95 per set for orders of 10 or more sets) to Professor Walter Mead, 1279 Grizzly Peak Blvd., Berkeley, CA 94708; telephone: (415) 549-1386.

No. 41: 'Last Day of the Convention'

It is the morning of Monday, September 17th, 1787, the final day of the Constitutional Convention. In striking contrast to what the delegates have endured throughout most of the summer, the air is cool. The touch of autumn reminds them of the time that has elapsed since most of them last saw their families the previous May. Forty-one of the fifty-five delegates have stayed to the very end and have assembled in their seats. Although its words are already thoroughly familiar to them, the entire final draft of the proposed new Constitution, on which they have so long and so diligently labored, is read aloud. Then James Wilson reads for the frail doctor Benjamin Franklin perhaps the most eloquent speech of his long life, in which the patriarch urges that each of his colleagues, whatever their differences throughout the summer have been, now unite in signing the document.

There follow numerous other pleas for unity. The clock outside on the State House wall strikes three before all the speeches are concluded. Then the delegates begin to file, one after another to the table at the front of the room where they affix their signatures to the still controversial document. Thirty-eight of the forty-one delegates sign, and one signs for still another who is absent because of illness. This is no small accomplishment. All would have preferred a Constitution different in some particulars, but the vast majority are convinced that the present proposal is the best they could ever agree upon and infinitely superior to the apparent alternative—anarchy.

On the crown surmounting the high back of General Washington's chair is a carved and gilded sun. While the last of the delegates signs the Constitution, Ben Franklin is heard commenting to those around him that, as he had pondered the outcome during the changing moods of the convention, he had wondered whether the sun on the back of the chair was rising or setting. "But now at length," declares Franklin, "I have the happiness to know that it is a rising and not a setting sun."

Jesuit Colleges Plan for Bicentennial

The Association of Jesuit Colleges and Universities (AJCU), a voluntary organization of 28 colleges and universities in 18 states and the District of Columbia, will conduct as its contribution to the national celebration of the Bicentennial of the Constitution a project entitled "National Dialogue".

"National Dialogue" will consist of a variety of programs on constitutional themes initiated by member institutions and coordinated by the national headquarters of AJCU.

Some projects are already underway: a telecourse on the Constitution (Canisius College, Buffalo), a 3-day workshop on teaching the Constitution for secondary school teachers (Creighton University, Omaha), a law school conference comparing the Constitutions of the United States and Canada (University of Detroit), a reenactment of the constitutional debates (University of Detroit), a senior class year-long theme (John Carroll University, Cleveland), a year-long exhibit for students and visitors (Loyola University, Chicago), faculty colloquia with a visiting scholar (Rockhurst College, Kansas City), an essay competition for students (Spring Hill College, Mobile), several public lectures, a series of TV presentation for alumni groups and the production of scholarly articles on constitutional themes.

The Jesuit higher education system includes 4 medical schools, 9 schools of education, 13 law schools, 21 schools of business, 22 Conferences, 28 colleges of liberal arts and sciences. All are being urged to participate, and to reach out in dialogue to their colleagues, alumni, other church-related schools and communities.

Commission on the Bicentennial of the U.S. Constitution

Staff Director: *Mark Cannon* (202) 872-1787
Deputy Director: *Ronald Mann* (202) 872-1787

State and Local Programs: *Paul Clark* (202) 653-9808
Plans and Project Recognition: *Bill Buckingham* (202) 653-9800
Communications: *Tait Trussell* (202) 275-9168
Federal and International Programs: *Ronald Trowbridge* (202) 653-2487
Private Programs: *Gertrude Fry* (202) 653-5377
Educational Programs: *Lane Sunderland* (202) 653-5109

Bill of Rights Bicentennial in 1991

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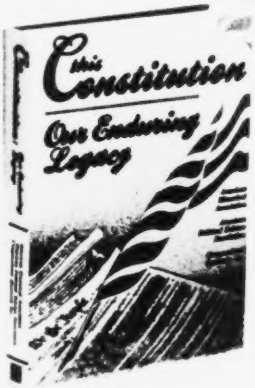

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Project '87

The American Constitutional Bicentennial

Project '87 is a joint undertaking of the American Historical Association and the American Political Science Association. It is dedicated to commemorating the Bicentennial of the United States Constitution by promoting public understanding and appraisal of this unique document.

The Project is directed by a joint committee of historians and political scientists which is chaired by two scholars of international reputation—Professor Richard B. Morris of Columbia University and Professor James MacGregor Burns of Williams College. Warren E. Burger, retired Chief Justice of the United States, serves as Honorary Chairman of Project '87's Advisory Board.

The implementation of Project '87 has been divided into three distinct but interrelated stages. Stage I, devoted to research and scholarly exchanges on the Constitution, has been underway for the past several years. The Project has awarded fifty-one research grants and fellowships and supported five major scholarly conferences dealing with various aspects of the Constitution. Activities in connection with Stage II—teaching the Constitution in schools and colleges—began in 1980, and Project '87 is now implementing Stage III, programs for the public designed to heighten awareness of the Constitution and to provoke informed discussion on constitutional themes.

It is the hope and expectation of the Project's governing committee that, through its activities and those of others, both students and the public alike will come to a greater awareness and comprehension of the American Constitution.

Core support for Project '87 comes from the William and Flora Hewlett Foundation. Additional grants for specific programs have been provided by the National Endowment for the Humanities, which funds the magazine, and by the Andrew W. Mellon Foundation, the Lilly Endowment, Inc. of Indianapolis, Indiana, the Rockefeller Foundation, the Ford Foundation, CSX Corporation, the Exxon Education Foundation and the AT&T Foundation.

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...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle Summer 1987, No. 15

Project '87

The Constitution of the United States of America

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, DO ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature.

No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[1] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3.

The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,[2] for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, The Executive thereof may make temporary appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.[2]

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Continued on page 52

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1. This clause has been changed by the 14th Amendment.
2. These clauses have been changed by the 17th Amendment.

Text as prepared by the U.S. Senate Republican Policy Committee, Washington, D.C., 1986.

...do ordain and establish

this Constitution

for the United States of America.

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Cover: Assembly Room, Independence Hall, Philadelphia, setting for the Constitutional Convention. Photograph by David Sharpe, Inc., Alexandria, Virginia, © 1986.

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Special Issue: The Two Hundredth An

this Constitution

published by Project '87 of the American Historical Association and the American Political Science Association

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From the Editor

"It is expedient that on the second Monday in May next a convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation . . . ."

So decided the Confederation Congress on February 21, 1787. The delegates, however, did not follow this instruction precisely. They did not meet until May 25 and when they did, they did not confine themselves to revising the Articles of Confederation. They drafted an entirely new constitution, one that has governed this country for two hundred years.

In this summer of 1987, ***this Constitution*** honors the Bicentennial of that constitutional convention with an issue that focuses on the antecedents, the context and the outcome of its deliberations. Gordon S. Wood, in "The Origins of the Constitution," explores the problems of the national and state governments that produced movements for reform in the 1780s. Pauline Maier, in "The Philadelphia Convention and the Development of American Government: From the Virginia Plan to the Constitution," describes the deliberations that brought forth the Constitution—its evolution from the preliminary plan offered by the Virginia delegation to the final document. James A. Henretta follows with a portrait of the social and economic context of the Convention in "Society and Republicanism: America in 1787." He shows the distinct perspectives of artisans, farmers, women and black Americans on the political events of the time and points out that the tensions existing between Americans became imbedded in the frame of government.

For the "Documents" section, James H. Hutson offers a view of America in the 1780s through recently discovered original documents of the delegates to the Constitutional Convention. Those who attended the Convention were at once intrigued by the demonstration of a new mode of transportation—the steamboat—and appalled by the stoning of a "witch" in the streets of Philadelphia that same summer. Other documents give us insight into what the delegates were thinking as they crafted the Constitution.

The vignettes and photographs in Margaret Horsnell's essay, "Who Was Who in the Constitutional Convention," highlight the contributions of some of the Convention's more notable figures. The events of one week during the summer the Convention met, July 9 to July 13, are excerpted from *A Daybook for 1787*, put together by the historians at Independence National Historical Park. John Kaminiski explains why one state—Rhode Island—stayed away from the Federal Convention, in " 'Outcast' Rhode Island—the Absent State."

As a summation, Henry Steele Commager steps back and looks at the work of the whole group in "The Achievement of the Framers."

A syllabus on the founding period that can be used for adult reading/discussion groups in many settings is also featured in this issue. This seven-part list of readings by Jack P. Greene is called "The Fabrication of the American Republic, 1776–1800." The Bicentennial Gazette is a guide to national organizations planning programs and producing materials for the Bicentennial celebration.

The text of the Constitution, the subject of this commemoration, begins on the inside front cover and continues on page 52.

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In September 1983, ***this Constitution*** inaugurated its discussion of the Constitution by examining "Thirteen Crucial Questions" about the Constitution. Each issue since then has highlighted one of those questions. It is fitting to offer a consideration of which "crucial questions" are likely to confront the United States in the next century and we will do so next

ersary of the Constitutional Convention

summer in issue no. 18 of ***this Constitution***.

We invite the readers of ***this Constitution*** to participate in this discussion by sending a brief letter identifying a constitutional issue and the reasons for its importance in the next hundred years. Address your response to: Issues Survey, ***this Constitution***, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036. Submissions become the property of Project '87 and will not be returned. We may select quotations from the letters to highlight the report on the survey. Responses must be received by August 1, 1987.

Thirteen Enduring Constitutional Issues

- National Power—Limits and Potential
- Federalism—the Balance between Nation and State
- The Judiciary—Interpreter of the Constitution or Shaper of Public Policy
- Civil Liberties—the Balance between Government and the Individual
- Criminal Penalties—Rights of the Accused and Protection of the Community
- Equality—its Definition as a Constitutional Value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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The Origins of the Constitution

by GORDON S. WOOD

When did the story of the Constitution begin? Some might say it began over 2500 years ago in the city-states of ancient Greece. Others might place its beginnings nearly three-quarters of a millennium back in the fields of Runnymede. Still others might say the Constitution had its origins three centuries or so ago during the tumultuous years of the seventeenth-century English revolutions. Or others, more patriotic perhaps, might date the beginnings of the Constitution from events in the Western Hemisphere, from the Mayflower Compact, the Massachusetts Charter of 1629, or from any number of charters and constitutional documents that the colonists resorted to during the first century and a half of American history. More likely, the story of the Constitution might begin with the imperial crisis and debate of the 1760s. It is just possible that the forty years between 1763 and 1803 in America were the greatest era in constitutionalism in modern Western history. Not only did Americans establish the modern conception of a constitution as a written document defining and delimiting the powers of government, but they also made a number of other significant constitutional contributions to the world, including the device of a convention for creating and amending constitutions, the process of popular ratification of constitutions, and the practice of judicial review by which judges measure ordinary legislation against the fundamental law of the constitution. During these brief forty years of great constitutional achievements between 1763 and 1803 the story of the Constitution of 1787 is only a chapter. But it is a crucial and significant chapter.

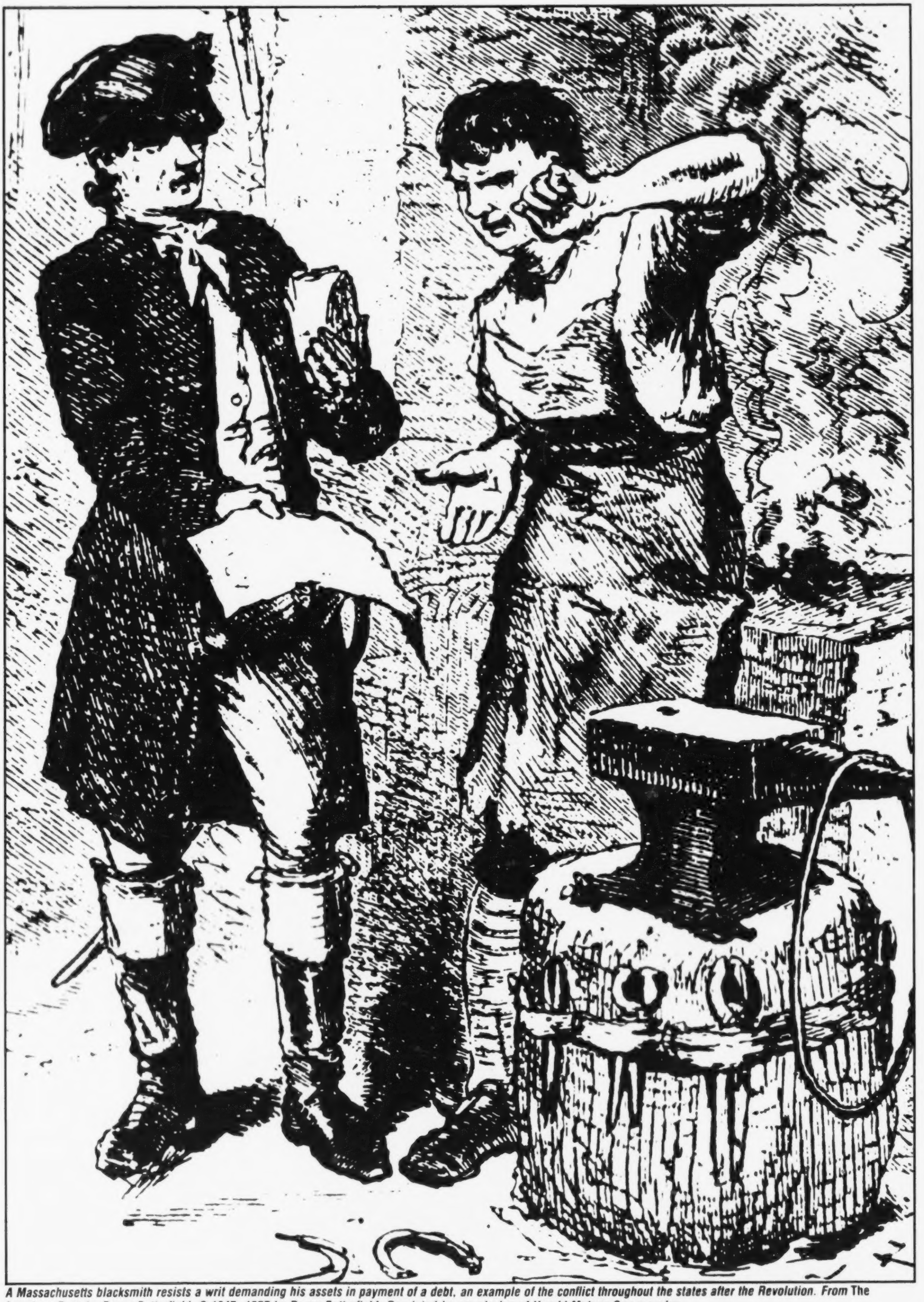
It is hard for us today to appreciate what an extraordinary, unforeseen achievement the Constitution of 1787 was. We take a strong national government so much for granted that we can scarcely understand why the American Revolutionaries of 1776 did not create the Constitution at once. But in 1776 virtually no American contemplated something like the Constitution of 1787. No one in 1776 even imagined for Americans a powerful continental-wide national government operating directly on individuals. The colonists in the British empire had experienced enough abuses from far-removed governmental power to make them leery of creating another distant government. And besides, the best minds of the eighteenth century, including Montesquieu, said that a large continental-sized republic was a theoretical impossibility. In 1776 it was obvious to all Americans that their central government would have to be a confederation of some sort, some sort of league or alliance of the thirteen independent states. The Articles of Confederation created such a central government.

Confederation

The Articles of Confederation were our first national constitution. Proposed by the Continental Congress in 1777, they were not ratified by all the states until 1781. Although we today pay very little attention to the Articles and can hardly take them seriously, at the time they were a remarkable achievement. The Articles created a much stronger federal government than many Americans expected; it was in fact as strong as any similar republican confederation in history. Not only were substantial powers concerning diplomacy, the requisitioning of soldiers, and the borrowing of money granted to the Confederation Congress, but the Articles specifically forbade the separate states to conduct foreign affairs, make treaties, and declare war. All travel restrictions and discriminatory trade barriers between the states were eliminated, and the citizens of each state were entitled to the "privileges and immunities" of the citizens of all states. When we compare these achievements with what the present-day European nations are struggling to attain in their own continental union, we can better appreciate what an extraordinary accomplishment the Articles represented.

Despite the notable strength of this Confederation, however, it was clear that it was something less than a unitary national government. Under the Articles the crucial powers of commercial regulation and taxation—indeed, all final lawmaking authority—remained with the states. Congressional resolutions were only recommendations to be left to the states to enforce. And should there be any doubts of the decentralized nature of the Confederation, Article 2 stated bluntly that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." The "United States of America" had a literal meaning that is unfamiliar to us today. The Confederation was based on the equal representation of each state in the Congress. It was less a single government than it was a treaty among sovereign states. It was intended to be and remained, as Article 3 declared, "a firm league of friendship" among states jealous of their individuality. Not only ratification of the Articles of Confederation but any subsequent amendment of them required the consent of all the states.

As a confederation the United



A Massachusetts blacksmith resists a writ demanding his assets in payment of a debt, an example of the conflict throughout the states after the Revolution. From The American Past *by Roger Butterfield. C 1947, 1957 by Roger Butterfield. Reprinted by permission of Harold Matson Company Inc.*

It is hard for us today to appreciate what an extraordinary unforeseen achievement the Constitution of 1787 was.

States achieved a good deal, including the winning of the war and independence from Great Britain. But scarcely a half dozen years after the final ratification of the Articles in 1781, the Confederation was virtually moribund and nearly every American was calling for its reform. The Confederation government was not adequate to the demands of the 1780s; a more powerful central government was needed. The calling of the Philadelphia Convention in 1787 and the new Constitution were the results.

It seems to be a simple story, but it is not. For despite a general dissatisfaction with the Articles by 1786–87 and a general willingness to add to the powers of Congress, the Constitution that was created in 1787 was not what most people expected. The new federal government was not simply a stronger league of friendship with some additional powers granted to the Congress. It was a radically new government altogether—one that utterly transformed the structure of central authority and greatly weakened the power of the states. The Constitution of 1787 created an overarching national republic that operated on individuals directly; its creation was inconceivable a decade earlier. What had happened? What could have changed American thinking so dramatically? Given the Americans' loyalty to their states and their deep-rooted fears of centralized governmental authority, explaining the Constitution of 1787 is not as easy as it looks.

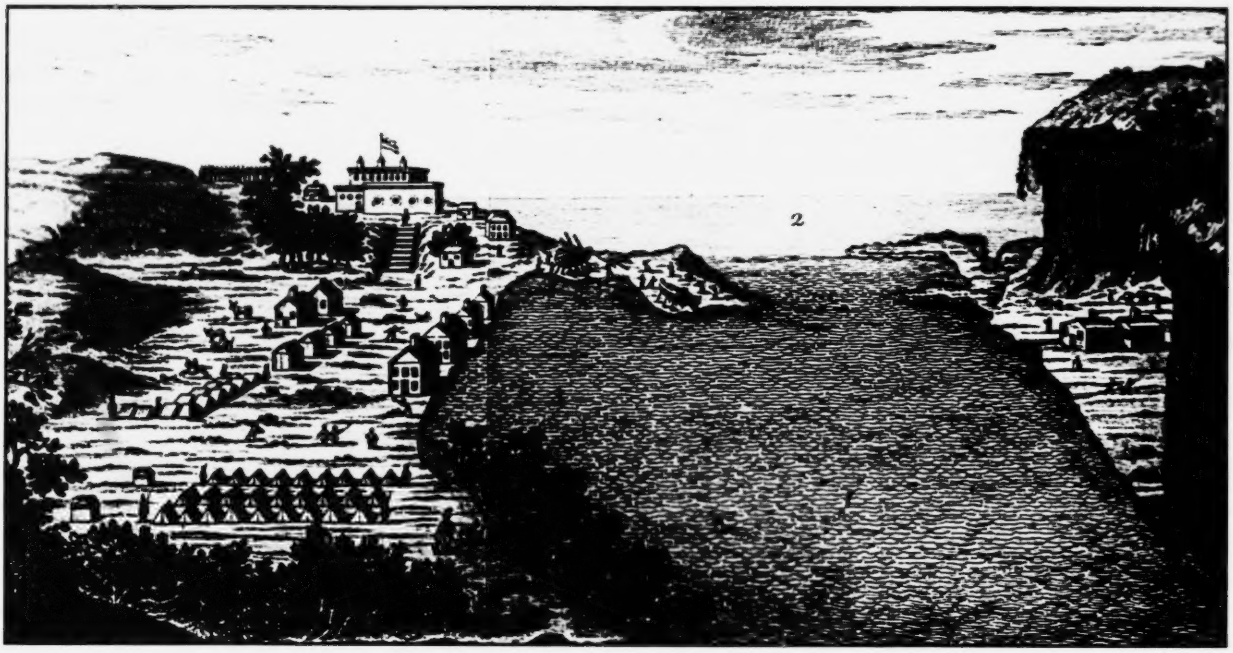
Some Americans in the 1780s talked about a crisis in the United States, and historians have seized upon this talk and labeled the 1780s "the Critical Period of American History." Yet documenting a real crisis in the society, a crisis sufficient to justify the radical change of government in 1787, is not a simple matter. To be sure, there was an economic depression in 1784–85 caused by the buying spree and the overextensions of credit following the war, but by 1786 the country was coming out of it and people were aware of returning prosperity. Commerce was confused and disrupted, but the commercial outlook was far from bleak. American merchants were pushing out in every direction in search of markets and were sailing even as far away as China. The 1780s do not seem to be a time of crisis; they were in fact a time of unprecedented exuberance and expansion. The American population grew as never before (or since), and more Americans than ever were off in pursuit of happiness and prosperity. "There is not upon the face of the earth a body of people more happy or rising into consequence with more rapid stride, than the Inhabitants of the United States of America," the secretary of the Continental Congress Charles Thomson wrote Thomas Jefferson in 1786. "Population is increasing, new houses building, new lands clearing, new settlements forming, and new manufacturers establishing with a rapidity beyond conception." The general mood was optimistic and expectant.

No wonder then that many historians have doubted that there was anything really critical happening in the society. Perhaps the critical period, wrote Charles Beard in his *An Economic Interpretation of the Constitution* published in 1913, was not really critical after all, "but a phantom of the imagination produced by some undoubted evils which could have been remedied without a political revolution." Perhaps the crisis, said Jackson Turner Main in his study of the *Antifederalists* in 1961, was only "conjured up" by a few leaders since "actually the country faced no such emergency." Was the movement for the Constitution something of a fraud without justification in the social and economic reality of the day?

But then we have all those despairing statements by Americans in the 1780s declaring that America was in the midst of a crisis more serious than anything experienced during the darkest days of the war. Many believed that America's great experiment in republicanism was in danger and that America's "vices" were plunging the nation into "ruin." The enlightened Philadelphia physician Benjamin Rush went so far as to say that Americans were on the verge of "degenerating into savages or devouring each other like beasts of prey." Even the sober and restrained George Washington was astonished at the changes the few years since 1776 had produced: "From the high ground we stood upon, from the plain path which invited our footsteps, to be so fallen! so lost! it is really mortifying."

How can we explain such excited and despondent statements—statements that can be multiplied over and over? What had happened? Could Americans, so confident in 1776, have lost their nerve so quickly? Could any problems with the Articles of Confederation, with the weaknesses of the union, have brought forth such fearful handwringing? Explaining the sense of crisis in the 1780s and hence the movement for the Constitution requires something more than just detailing the defects of the Confederation Congress. Such defects, however serious, could hardly account for the pervasive sense of crisis.

There are in fact two levels of explanation for the Constitution, two different sets of problems, two distinct reform movements in the



Fort Oswego on Lake Ontario, one of the outposts where the British maintained troops in violation of the 1783 Treaty of Paris. American Antiquarian Society.

1780s that eventually came together to form the Convention of 1787. One operated at the national level and involved problems of the Articles of Confederation. The other operated at the state level and involved problems in the state legislatures. The national problems account for the ready willingness of people in 1786–87 to accede to the convening of delegates at Philadelphia. But the state problems, problems that went to the heart of America's experiment in republicanism, account for the radical and unprecedented nature of the federal government created in Philadelphia.

National Problems

The weaknesses of the Articles of Confederation were apparent early, even before the Articles were formally ratified in 1781. By 1780 the war was dragging on longer than anyone had expected, and the skyrocketing inflation of the paper money that was being used to finance it was unsettling commerce and business. The Articles barred congressional delegates from serving more than three years in any six-year period, and leadership in the Confederation was changeable and confused. The states were ignoring congressional resolutions and were refusing to supply their allotted contributions to the central government. The Congress stopped paying interest on the public debt. The Continental army was smoldering with resentment at the lack of pay and was falling apart through desertions and even outbreaks of mutiny. All these circumstances were forcing various groups, including the army and merchant and creditor interests centered in the mid-Atlantic states, to seek to add to the powers of the Congress. They tried to strengthen the Congress by broadly interpreting its enumerated powers, by directly amending the Articles, and even by threatening military force against those states that did not fulfill their obligations to Congress.

A shift in congressional leadership in the early 1780s demonstrated the increasing influence of these concerned groups. Older popular radicals such as Richard Henry Lee of Virginia and Samuel Adams of Massachusetts were replaced by such younger men as James Madison of Virginia and Alexander Hamilton of New York. These new leaders were more interested in authority and stability than in popular liberty. Disillusioned by the Confederation's ineffectiveness, these nationalists in the Congress set about reversing the localist and centrifugal thrust of the Revolution. They strengthened the regular army at the expense of the militia and promised pensions to the Continental army officers. They reorganized the departments of war, foreign affairs, and finance in the Congress and replaced the committees that had been running these departments with individuals.

The key man in the nationalists' program was Robert Morris, a wealthy Philadelphia merchant who was made superintendent of finance and virtual head of the Confederation in 1781. Morris undertook to stabilize the economy and to involve financial and commercial groups with the central government. He persuaded the Congress to recommend to the states that paper-money laws be repealed and to require that the states' contributions to the general expenses be paid in specie (gold or silver coin) and he sought to establish a bank to make the federal government's bonds more secure for investors.

Carrying out this nationalist program depended on amending the Articles so as to grant the Confederation the power to levy a 5 percent duty on imports. Once the Congress had revenues independent of the states, the Confederation could pay its debts and would become more attractive to prospective buyers of its bonds. Although Morris was able to get the Congress to charter the Bank of North America, the rest of the nationalists' economic proposals failed to get the consent of all the states. In 1782 congressional efforts to get the states to approve the 5 percent import amendment foundered first on Rhode Island's refusal and then on Virginia's. When a compromise attempt in 1783 to get a revenue for Congress also came to nothing, those who hoped to reform the Articles became increasingly discouraged.

After the victory at Yorktown in October 1781 and the opening of peace negotiations with Great Britain, the states rapidly lost interest in the Congress. Some nationalists even sought to use the unrest in the army to further their cause. The prospect of the Congress' demobilizing the army without fulfilling its promises of back pay and pensions created a crisis that brought the United States as close to a military coup d'état as it has ever been. In March 1783 the officers of Washington's army, encamped at Newburgh on the Hudson River, issued an address to the Congress concerning their pay and actually considered some sort of military action against the Confederation. Only when Washington personally intervened and refused to support a movement that he said was designed "to open the floodgates of civil discord, and deluge our rising empire in blood" was the crisis averted.

Before resigning his commission as commander-in-chief, Washington in June 1783 wrote a circular letter to the states, which he called his "legacy" to the American people. In it he recommended the creation of "a supreme power to regulate and govern the general concerns of the confederated republic." This was the moment, said Washington, "to give such a tone to our federal government as will enable it to answer the ends of its institution." It was a time of testing for the American people, "the eyes of the whole world are turned upon them." Upon the willingness of the states to grant sufficient power to Congress to fulfill its needs and preserve its credit depended whether the United States would "be respectable and prosperous, or contemptible and miserable, as a nation . . . whether the revolution must ultimately be considered as a blessing or a curse . . . not to the present age alone" but also to "unborn millions."

Yet news of the peace treaty with Great Britain shattered much of this wartime unionist sentiment, and Washington's pleas for strengthening the central government were smothered by the reassertion of traditional state loyalties and jealousies. By December 1783 the Congress, in Thomas Jefferson's opinion, had lost most of its usefulness. "The constant session of Congress," he said, "can not be necessary in time of peace." After clearing up the most urgent business, the delgates should "separate and return to our respective states, leaving only a Committee of the states," and thus "destroy the strange idea of their being a permanent body, which has unaccountably taken possession of the heads of their constituents."

Congressional power, which had been substantial during the war years, now began to disintegrate. The congressional delegates increasingly complained of how difficult it was just to gather a quorum. The Congress could not even agree on a permanent home for itself: it wandered from Philadelphia to Princeton, to Annapolis, to Trenton, and finally to New York City. The states reclaimed their authority and began taking over the payment of the federal debt that many individuals had earlier hoped to make the cement of union. By 1786 nearly one-third of the Confederation's securities had been converted into state bonds, thus creating a vested interest among public creditors in the sovereignty of the individual states. Under these circumstances the influence of those, in Alexander Hamilton's term, "who think continentally" rapidly declined, and the chances of amending the Confederation piecemeal declined with them.

The Confederation's inability to regulate its international commerce led to even more confusion and frustration. Both northern merchants and southern planters needed to penetrate the markets of the European empires with American produce. Southern agrarian leaders such as Jefferson and James Madison feared that if the European mercantilist states prohibited American farmers from selling their surplus crops freely in their empires, American society would be decisively affected. Not only would the industrious character of the American farmers be undermined, but if Americans could not sell abroad the United States would be unable to pay for the manufactured goods imported from Europe, and therefore would have to develop large-scale manufacturing for itself. This industrialization would in turn create in America the same mob-ridden manufacturing cities and the same corrupt, rank-conscious and dependent societies that existed in Europe. Under these conditions the independent farmer-citizenry which sustained American republicanism could not long endure.

Yet the mercantilist empires of the major European nations remained generally closed to the new republic in the 1780s. John Adams in Britain and Jefferson in France made strong diplomatic efforts to develop new international commercial relationships based on the free

The national problems account for the ready willingness of people in 1786–87 to accede to the convening of delegates at Philadelphia. But the state problems, problems that went to the heart of America's experiment in republicanism, account for the radical and unprecedented nature of the federal government created in Philadelphia.

exchange of goods, but these efforts failed. The French refused to take as much American produce as had been expected, and Britain effectively closed its markets to competitive American goods while recapturing American consumer markets for its own products. The Confederation lacked the authority to retaliate with its own trade regulations, and state and sectional jealousies blocked several attempts to grant the Congress a restricted power over commerce. The Confederation Congress watched helplessly as the separate states attempted to pass conflicting navigation acts of their own. By the mid-1780s Connecticut was laying even heavier duties on goods from Massachusetts than on those from Great Britain.

The Confederation felt its lack of power internationally as much as it did domestically. Abroad the reputation of the United States dwindled as rapidly as did its credit. The Dutch and French would lend money only at extraordinary rates of interest. Since American ships now lacked the protection of the British flag, many of them were seized by corsairs from the Muslim states of North Africa, and their crews sold as slaves. The Congress had no money to pay the necessary tribute and ransoms to these Barbary pirates.

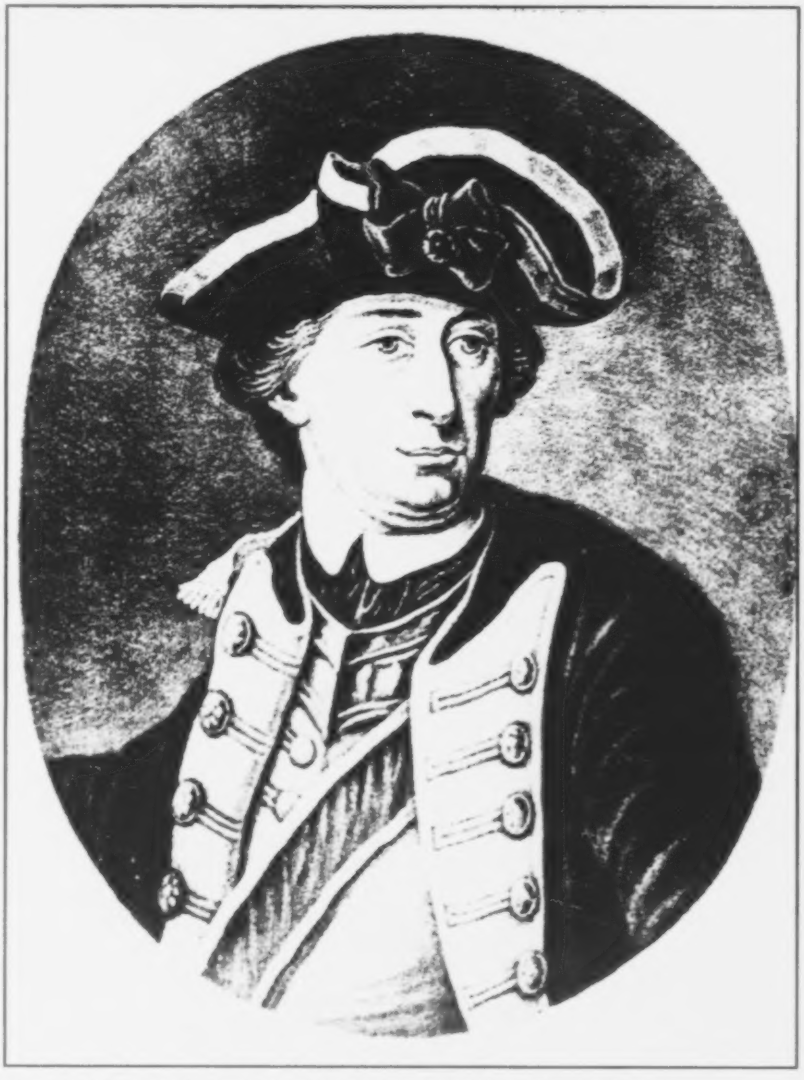
In the late-eighteenth century world of hostile empires, it was even difficult for the new republican confederacy to maintain its territorial integrity. Britain refused to send a diplomatic minister to the United States and ignored its treaty obligations to evacuate its military posts in the Northwest, claiming that the United States had not honored its own commitments. The treaty of peace had specified that the Confederation would recommend to the states that loyalist property that had been confiscated during the Revolution be restored, and that neither side would make laws obstructing the recovery of prewar debts. When the states flouted these treaty obligations, the impotent Confederation could do nothing; and therefore British troops remained in Detroit, Niagra, Oswego and other posts within American territory.

Britain was known to be plotting with the Indians and encouraging separatist movements in the Northwest and in the Vermont borderlands, and Spain was doing the same in the Southwest. Spain in fact refused to recognize American claims to the territory between the Ohio River and Florida. In 1784, in an effort to influence American settlers moving into Kentucky and Tennessee, Spain closed the Mississippi River to American trade. Many of the Westerners were ready to deal with any government that could ensure access to the sea for their agricultural produce. As Washington noted in 1784, they were "on a pivot. The touch of a feather would turn them any way."

In 1785–86, John Jay, a New Yorker and the secretary of foreign affairs, negotiated a treaty with the Spanish minister to the United States, Diego de Gardoqui. By the terms of this agreement, Spain was opened to American trade in return for America's renunciation of its right to navigate the Mississippi for several decades. Out of fear of being denied an outlet to the sea in the West, the southern states prevented the necessary nine-state majority in the Congress from agreeing to the treaty. But the willingness of a majority of seven states to sacrifice western interests for the sake of northern merchants aroused long-existing sectional jealousies and threatened to shatter the Union. In an address to the Congress in August 1786 Jay defended his treaty on the grounds that it was the best the United States could get from Spain, at least until it "shall become more really and truly a nation than it at present is."

By 1786 these problems made revision of the Articles of Confederation inevitable. Even those who later opposed the Constitution acknowledged that the Confederation Congress needed additional powers. Reform of the Articles by piecemeal amendment had run afoul of the jealousies of one state or another, and many were now looking toward some sort of convention of all the states as a solution.

Although some like Hamilton had suggested the calling of a national convention as early as 1780, the events in the mid-eighties that led to the Philadelphia Convention actually began as continuations of earlier attempts to strengthen the union within the framework of the Articles. The desire to grant Congress the power to regulate foreign trade was the stimulus. In 1785, at a conference at Mount Vernon, Virginia and Maryland resolved a number of disputes concerning the navigation of Chesapeake Bay and the Potomac River. This conference suggested the advantages of independent state action and led to Virginia's invitation to the states to meet at Annapolis in 1786 "to consider and recommend a federal plan for regulating commerce." Some hoped to make this Annapolis meeting a prelude to a full convention for amending the Articles. Madison was one of these, "yet," as he told Jefferson in August 1786, "I despair so much of its accomplishment at the present crisis that I do not extend my views beyond a Commercial Reform. To speak the truth *I almost despair even of this.*" But with only delegates from five states in attendance, the Annapolis meet-



Engraving of George Washington by Alexander Campbell. Colonial Williamsburg Foundation.

ing had little choice but to risk calling another convention. The stakes now were higher and this convention would have to be concerned with more than matters of commercial regulation. After only two days of discussion, the Annapolis delegates issued a report drafted by Hamilton requesting the states to elect delegates to a second convention to be held in Philadelphia on the second Monday in May of the following year "to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union." After seven states agreed to send delegates to Philadelphia, the Confederation Congress belatedly recognized this independent state action and in February 1787 authorized the approaching convention to meet "for the sole and express purpose of revising the Articles of Confederation."

Although by 1787 nearly all of America's political leaders agreed that some reform of the Articles was necessary, few expected what the Philadelphia Convention eventually created. For the new national government framed in 1787 went way beyond what the weaknesses of the Articles demanded. Granting the Congress the authority to raise revenue, to regulate trade, to pay off its debts, and to deal effectively in international affairs did not require the total scrapping of the Articles and the formation of an extraordinary powerful and distant national government the like of which was beyond anyone's imagination a decade earlier. The new Constitution of 1787 therefore cannot be explained by the obvious and generally acknowledged defects of the Articles of Confederation. Something more serious lay behind the proposals, deliberations, and resultant Constitution of the Philadelphia Convention.

State Politics

By the mid-1780s a number of American leaders were alarmed by politics within the states. The Revolutionaries in 1776 had placed great faith in the ability of the state legislatures to promote the public good. The new Revolutionary state constitutions had made the state legislatures more representative, had greatly increased their size, and had granted enormous power to them. But in the years after 1776 the state legislatures did not fulfill the Revolutionaries' initial expectations. The Revolution unleashed acquisitive and commercial interests that no one had quite realized existed in American society, and these factional interests were demanding and getting protection and satisfaction from state legislatures that were elected annually (an innovation in most states) by the broadest electorates in the world. Everywhere in the state electioneering and the open competition for office increased, and new petty uneducated entrepreneurs like Abraham Yates, a part-time lawyer and shoemaker of Albany, and William Findley, a Scotch-Irish ex-weaver of western Pennsylvania, used popular electoral appeals to vault into political leadership in the state legislatures.

The rapid turnover of seats and the scrambling among different interests made lawmaking seem chaotic. Laws, as the Vermont Council

Abuses of power by the state legislatures, more than the defects of the Articles of Confederation, were the real source of the crisis of the 1780s.

of Censors said in 1786, were "altered—realtered—made better—made worse; and kept in such a fluctuating position that persons in civil commission scarce know what is law." In fact, noted James Madison, more laws were enacted by the states in the decade following Independence than in the entire colonial period—all in response to pressures from shifting factions. Madison could only conclude sadly that "a spirit of *locality*" in the state legislatures was destroying "the aggregate interests of the community." In all the states the representatives, said Ezra Stiles, president of Yale College, were concerned only with the special interests of their electors. Whenever a bill was read in the legislature, "every one instantly thinks how it will affect his constituents." Appealing to the people therefore had none of the beneficial effects that good republicans had expected. A bill in Virginia having to do with court reform was "to be printed for consideration of the public," said Madison; but "instead of calling forth the sanction of the wise & virtuous," this appeal to the public, Madison feared, would only "be a signal to interested men to redouble their efforts to get into the Legislature." Democracy, in other words, was no solution to the problem; it was the problem. Pandering to voters and horse-trading politics were not what many Americans had expected from the Revolution.

By the mid-1780s many American leaders were convinced that the state legislatures and majority factions within those legislatures had become the greatest source of tyranny in America. The legislatures were swallowing up the powers of the other branches of government and were passing stay laws, paper money bills, and other debtor relief legislation in violation of the rights of creditors and other minorities. Such tyranny struck at the heart of America's experiment in republicanism, for, said Madison, it brought "into question the fundamental principle of republican Government, that the majority who rule in such governments are the safest Guardians both of public Good and private rights."

These abuses of power by the state legislatures, more than the defects of the Articles of Confederation, were the real source of the crisis of the 1780s; and ultimately it was these abuses that lay behind the radical reform of the central government. The confusing and unjust laws coming out of the state legislatures, Madison informed Jefferson in Paris in October 1787, had become "so frequent and so flagrant as to alarm the most stedfast friends of Republicanism," and these abuses "contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects."

In 1786 a rebellion of nearly 2,000 debtor farmers who were threatened with foreclosure of their mortgaged property broke out in western Massachusetts. This rebellion, led by a former militia captain, Daniel Shays, confirmed many of these anxieties about state politics. The insurrection, which temporarily closed the courts and threatened a federal arsenal, occurred in the very state that was considered to have the best-balanced constitution. Although Shays' rebels were defeated by militia troops, his sympathizers were victorious at the polls early in 1787. The newly-chosen state representatives soon enacted debtor relief legislation that added to the growing fears of legislative tyranny.

By 1787 many expected the Philadelphia Convention to solve not only the problems of the Articles of Confederation but also the problems of state politics. Two different and hitherto separate reform movements now came together to save both the Congress from the states and the states from themselves. At the national level, various groups—public creditors, merchants, diplomatic officials—had long been trying to amend the Articles. Now they were joined by others: urban artisans who hoped that a stronger national government would prevent competition from British imports; and southerners who wanted to gain representation in the national government proportional to their growing numbers. But reinforcing these groups clamoring for changes in the Articles were also those deeply concerned with the problems of state politics. It was these state problems that ultimately forced Americans to redefine the crisis they faced in the most momentous terms. Since majoritarian tyranny and the legislative abuses of the states flowed from the Revolutionary aim of increasing the participation of the people in government, the very success of the Revolutionary experiment in popular government was at stake. Thus creating a new central government was no longer simply a matter of cementing the Union or standing firm in foreign affairs or satisfying the demands of particular creditor, merchant, and artisan interests. It was now a matter, as Madison declared, that would "decide for ever the fate of Republican Government."

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The Philadelphia Convention and the Development of American Government: From the Virginia Plan to the Constitution

by PAULINE MAIER

The Virginians arrived early. Gradually other delegates drifted into Philadelphia, drawn from the far reaches of the United States to take up what they knew would be a work of historic importance. The plan of government proposed by the constitutional convention would, said James Madison, "decide for ever the fate of Republican Government." Should the convention fail to repair the "defective systems" then in effect, the people would in time renounce the blessing of self-government "and be ready for any change that may be proposed to them." If the American republic failed, Roger Sherman added, mankind might well "despair of establishing Governments by Human wisdom and leave it to chance, war and conquest." Upon the convention's work depended, in short, the future of the American people and "the cause of Liberty throughout the world."

The significance of the event helped draw a remarkable group of people to Philadelphia in the spring and summer of 1787. Of the fifty-five delegates who attended the convention, eight had participated in the constitutional conventions of their states, seven had been governors, and 39—over 70 percent of the total—had served in the Continental Congress. One of every three had been in the Continental Army, which also increased their commitment to the United States as a nation.

The average delegate was forty-two years old, but the most brilliant of them were even younger. Alexander Hamilton of New York was thirty, James Madison of Virginia—"the father of the Constitution"—thirty six. James Wilson of Pennsylvania, whose contributions to the convention rivalled Madison's, was eight years older than Madison. He had, however, arrived from his native Scotland only in 1765. As a result, like the younger delegates, he learned the art of American politics under the popular institutions of the Revolution, not the old colonial system. That was important. Such men were not only practicing political scientists, fascinated with the challenge of constructing institutions so the American republic could survive longer than any republic in times past; they were experienced politicians who knew how to get things done in a democratic system.

The list of delegates also included several older Americans who brought considerable prestige to the convention, particularly Benjamin Franklin and George Washington, the ex-commander of the Continental Army and the most respected person in the United States. Some notable Americans were absent: John Adams and Thomas Jefferson, for example, were serving their country as diplomats in Europe. Even so, when Jefferson reviewed the convention's membership he characterized it as "an assembly of demigods."

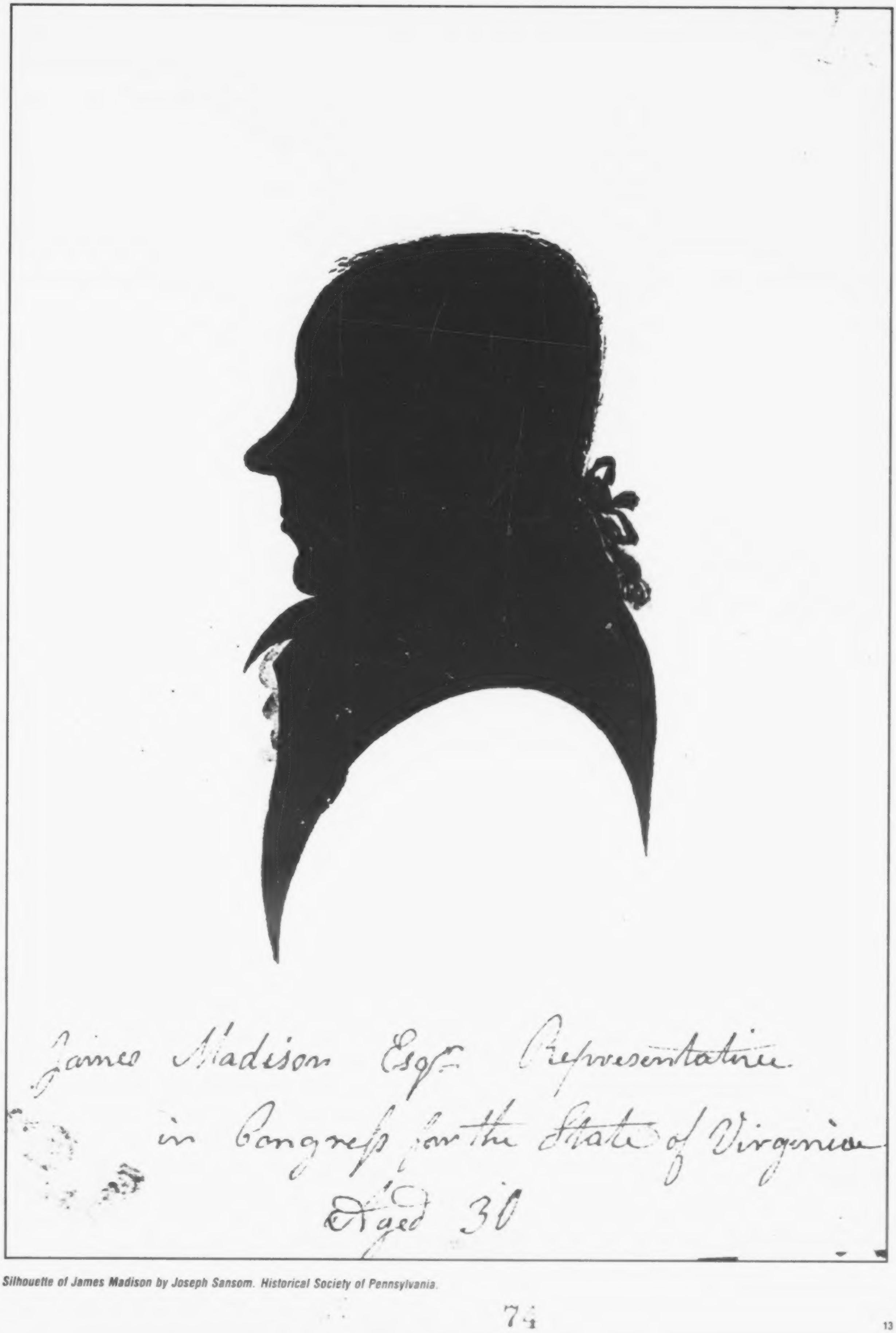
Certainly the distinction of the delegates was out of keeping with the work of a convention "for the sole and express purpose of revising the articles of confederation," as the Continental Congress said in February 1787. From the beginning, some people doubted that so distinguished a set of delegates would gather for so limited a task. "I smelt a rat," Patrick Henry explained when asked why he had refused to attend the convention. Later he and other Anti-Federalists would charge that the convention conspired to undermine the American Revolution by destroying the states and replacing them with a great "consolidated government" like that which the British had tried to establish in the years before 1776.

Henry had cause for suspicion. Many delegates expected to do more than amend the Articles of Confederation; after all, in September 1786 the Annapolis Convention had called for a convention in Philadelphia to "take into consideration the situation of the United States" and "devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union." Most delegates agreed that the central government had to be given substantially more power—more, perhaps, that could be accomplished by revising the Articles of the Confederation. What the Philadelphia convention proposed was, however, not a reincarnation of the British Empire, but what Madison later described as "a new Creation—a real nondescript," namely, the American federal system.

No delegate had such a system clearly in mind when the convention first assembled in May 1787. It emerged during the convention, which adopted a plan proposed by Virginia as the foundation for its deliberations, then thoroughly revised and expanded that plan in creating the federal constitution. Only after the convention dissolved did the "founding fathers" understand what they had accomplished.

Adopting the Virginia Plan

Between May 25 and 29 the convention elected its president, Washington, and secretary, Major William Jackson, and defined its basic rules of proceeding. Each state's delegation would vote as a unit, and seven states would constitute a quorum. (At the time that rule was adopted only nine states were represented, though in the end all the original thirteen states except Rhode Island would participate in



James Madison Esqr. Representative
in Congreſs for the State of Virginia
Aged 30

Silhouette of James Madison by Joseph Sansom. Historical Society of Pennsylvania.

the convention.) Moreover, the convention's proceedings were to be secret: the "yeas" and "nays" on specific proposals would not be recorded so delegates could more freely change their opinions, and nothing said in the convention was to be communicated to the outside world "without leave." Finally the convention turned to its main business.

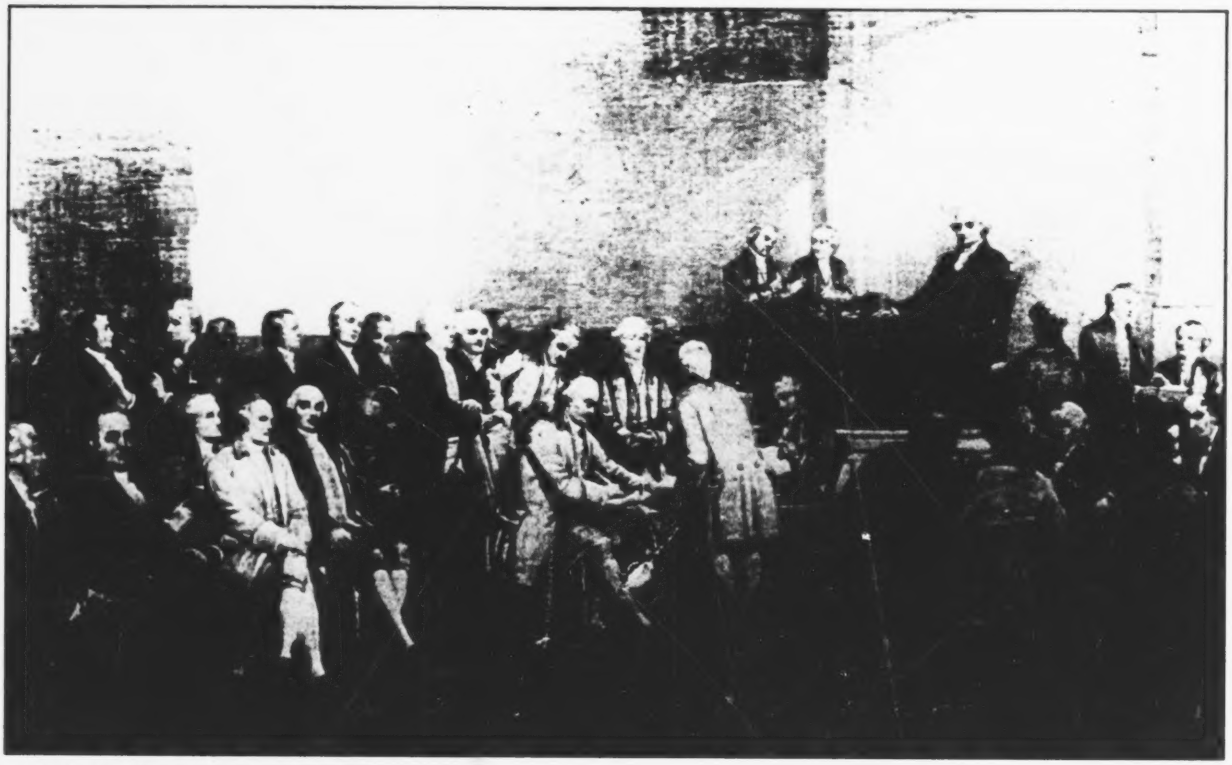
Gov. Edmund Randolph of Virginia took the floor. He spoke of the crisis that led to the calling of the convention and "the necessity of preventing the fulfilment of the prophecies of the American downfall"; he summarized what was essential in any revised governmental system, and why the Articles of Confederation, though the best that could be achieved eleven years earlier, "in the then infancy of the science, of constitutions, & of confederacies," were no longer adequate. Finally, Randolph proposed to replace the Confederation with a new plan of government—the Virginia Plan. It consisted of fifteen resolves outlining a new national government that would include a bicameral legislature with power to "legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted" by separate state laws. The new legislature would, moreover, be able to "negative," or veto, state laws that in its opinion violated the articles of Union, and to use force against states that failed to fulfill their duties under those articles. The Virginia Plan also provided for a separate "National Executive" and a "National Judiciary." The new scheme of government was to be ratified by special conventions, elected by the people of the various states for that purpose.

Both Randolph's remarks and his proposal showed the influence of James Madison, who was perhaps the most knowledgeable student of government among the delegates at Philadelphia. Madison had prepared carefully for the convention by studying the history of all previous confederations in history, their strengths and defects, and by examining with equal care the "vices" of American government in the 1780s. From those studies Madison sought ground rules for the revision of American institutions. His conclusions shaped the Virginia Plan.

The convention immediately resolved itself into a committee of the whole "to consider of the state of the American Union," and in that role it discussed rigorously the Virginia Plan from May 30 through June 13, revising and expanding the original Randolph proposals. Meanwhile, more delegates arrived, many of whom were uncomfortable with the direction of change in which the convention had apparently committed itself. Finally, on June 15, William Paterson of New Jersey presented to the convention an alternative plan, one that better represented the views of several "small state" delegates. It became known as the New Jersey Plan.

The Virginia and New Jersey plans differed in their provisions for representation. According to the Virginia Plan, representation in both houses of the national legislature would be proportional to population or contributions to the national treasury. Under the New Jersey Plan, each state would continue to be represented equally, as was true in the Confederation's Congress. To delegates from states like Virginia that had relatively large populations, or that expected their populations to grow substantially in the future, the principle of proportional representation had been "improperly violated" in the Confederation. "As all authority was derived from the people," James Wilson argued, "equal numbers of people ought to have an equal n[umber] of representatives, and different numbers of people different numbers of representatives ... Are not the Citizens of Pen[nsylvania] equal to those of N[ew] Jersey? does it require 150 of the former to balance 50 of the latter?" The delegates from Delaware, however, said they were bound by their instructions to consent to no change in the system of equal state representation, and "in case such a change should be fixed on, it might be their duty to retire from the Convention." New Jersey was equally insistent: under a system of proportional representation, Paterson argued, the small states would be "swallowed up" by large states. If the small states would not confederate on a plan of proportional representation, Wilson replied, Pennsylvania "& he presumed some other States" would confederate on no other. Disagreement over the system of representation was, in short, profound, and explains in part why the "small state" delegates developed the New Jersey Plan.

The supporters of the New Jersey Plan were, however, no less determined than those of the Virginia Plan to enhance significantly the powers of the central government, and so to give it, as David Brearly of New Jersey said, "energy and stability." Like the Virginia Plan, the New Jersey Plan granted the central government power to raise its own revenue and to regulate commerce, powers that had been denied the Confederation Congress. Although it would have continued the unicameral legislature of the Confederation, the New Jersey Plan authorized the establishment of a separate Executive branch and of a "federal Judiciary" whose members



The signing of the Constitution *by J. P. Rossiter. Library of Congress.*

would hold office "during good behavior," such that, in the end, the institutions it proposed would have resembled those of the Virginia Plan. Moreover, all acts of Congress made under the powers vested in it and all treaties ratified under the authority of the United States would be "the supreme law of the respective States," and the federal Executive would have power "to call forth [the] power of the Confederate States ... to enforce and compel an obedience to such Acts, or an observance of such Treaties" on the part of states or bodies of men within any state who interfered with the execution of such laws and treaties.

According to the supporters of the New Jersey Plan, the proposals of the Virginia Plan had little chance of being ratified. "Our object," Paterson said, "is not such a Government as may be best in itself, but such a one as our Constituents have authorized us to prepare, and as they will approve." As a result, the New Jersey Plan was drafted in a way that made it seem more in keeping with the announced purposes of the convention: it proposed to "revise" as well as to correct and enlarge the Articles of Confederation "to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union." The government proposed under the New Jersey Plan would therefore have remained "federal" in the language of the day. That is, it would have remained a Confederation of sovereign states (though the New Jersey Plan violated the "federal" nature of the Confederation by providing that the central government could enforce its authority on individuals directly). In proposing the Virginia Plan, Randolph had argued that a union "merely federal" in that sense was insufficient to provide for the "common defence, security of liberty, & gen[era]l welfare." A "*national* Government" was necessary, he said, one that would be "supreme."

On the same assumption, Alexander Hamilton proposed, during discussions of the New Jersey Plan, the establishment of a still more clearly "consolidated" national government. "Two Sovereignties can not co-exist within the same limits," he said, repeating the established wisdom of his time. So he would have placed "compleat sovereignty in the general Governm[en]t," and reduced the states to administrative units of that new-formed sovereign nation. For him, the New Jersey Plan would not work: "no amendment of the Confederation, leaving the States in possession of their Sovereignty," could possibly satisfy the country's needs. Nor did Randolph's proposals go far enough: "What even is the Virginia Plan, but pork still, with a little change of the sauce?"

Hamilton's plan, however, went too far: it was never seriously considered by the convention, no doubt because, as he admitted, it had no chance of being accepted at that time by a people whose attachments to the states remained strong. But did the New Jersey Plan have any better prospect? All previous attempts to increase the Confederation's power by amendments to the Articles of Confederation had failed to get the necessary unanimous state support, and therefore Paterson's plan, George Mason argued, "never could be expected to succeed."

The convention's decision on June 19, by a vote of 7 to 3, to proceed on the basis of the Virginia Plan was a critical one. It meant that the delegates had agreed to cut

[The framers of the Constitution] were not only practicing political scientists, fascinated with the challenge of constructing institutions so the American republic could survive longer than any republic in times past; they were experienced politicians who knew how to get things done in a democratic system.

loose from the Confederation and follow Washington's advice to adopt "no temporizing expedients," but probe the defects of the current system "to the bottom, and provide a radical cure." They were, however, no more ready than the proponents of the New Jersey Plan to go so far that their proposal would have no chance of ratification. In revising and developing the Virginia Plan, they had to find ways to answer accusations that they "meant to abolish the State Governm[en]ts altogether," to devise a system of government, as Madison later put it, that would "avoid the inefficacy of a mere confederacy without passing into the opposite extreme of a consolidated gov[ernmen]t." In doing that, they provided the foundations for a new definition of the word "federal," one that allowed a genuine sharing of power between two levels of government.

Revising the Virginia Plan

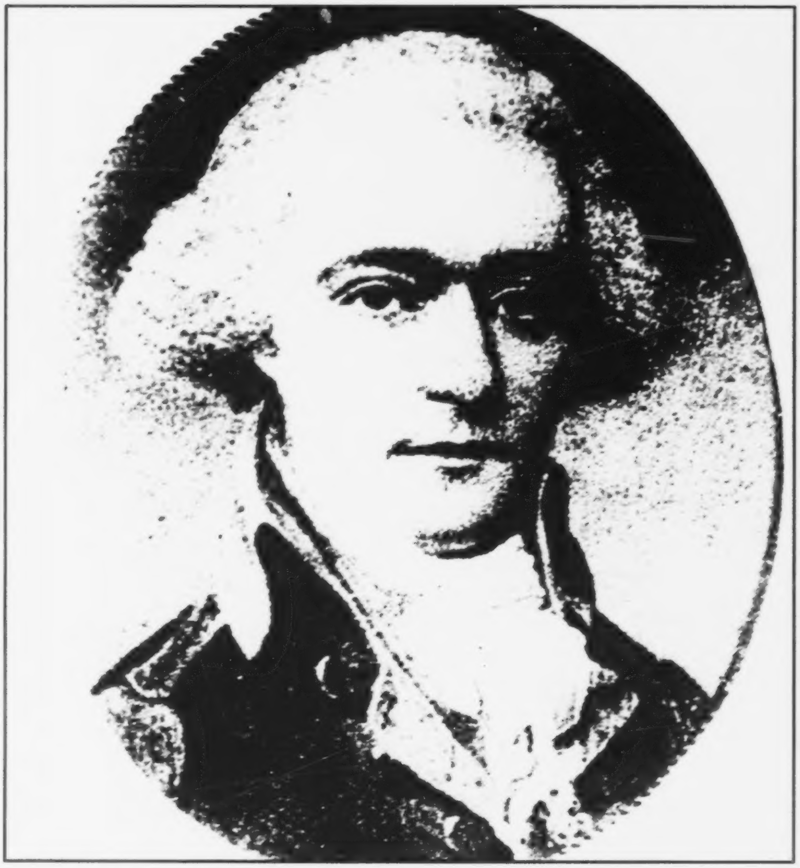
The Virginia Plan was in no way a complete plan of government. As originally presented, it included blanks for the convention to fill: Randolph's proposals, for example, specified only that members of the first branch of the national legislature "be elected by the people of the several States every ____ for the term of ____; to be of the age of ____ years at least...." Moreover, many specific provisions in the plan were clearly there mainly to focus debate. They may have represented the best thoughts of the Virginia delegation before the convention met, but even members of that delegation sometimes changed their minds in the course of the convention's debates. Madison, for example, decided soon after the Virginia Plan was presented that the use of force against states would be a mistake because it "would look more like a declaration of war, than an infliction of punishment." In any case, the Virginia Plan was far briefer than a constitution: clearly it would have to be expanded and organized and written in an appropriate form before the convention's work was done.

After its vote of June 19, the convention focused its attention again on the Virginia Plan, which it had already expanded from the original fifteen to nineteen resolutions. By July 26 the convention had agreed upon 23 resolutions, many of them longer than any of those originally proposed by Randolph. The convention then adjourned until August 6. Meanwhile, a Committee of Detail expanded Congress's resolutions into a draft constitution, which the convention again debated and changed. Finally, on September 8, another committee was appointed "to revise the style of and arrange the articles which had been agreed to by the house." Even after that Committee of Style completed its work, and on through September 17, when the convention finally dissolved, the delegates made further important revisions. The result was a constitution which, though built on the Virginia Plan, was strikingly different from its parent document. Above all, the convention more carefully divided and balanced power among the three branches of the central government, and between the states and the nation.

The most pressing issues before the convention concerned the legislature, the subject of Article I of the constitution. Dangerous divisions over representation were finally healed on July 16 with the convention's "Great Compromise," which allowed the states equal representation in the Senate. Representation in the House of Representatives would, however, be proportional to the number of free persons, including those bound to service for a term of years but excluding "Indians not taxed," and three-fifths "of all other Persons." Direct taxes were to be apportioned in the same way. Moreover, all money bills were to originate in the lower house, and a census would be taken every ten years so representation and taxation could be allocated appropriately.

The "other persons" mentioned were, of course, slaves. The "three-fifths" ratio was taken from a proposed amendment of 1783 to the Articles of Confederation; it was not the result of a separate compromise at the convention. The effect of counting three-fifths of a state's slave population in determining its representation in the House of Representatives was, however, to increase the power of those Southern states who had argued so strongly for proportional representation in both parts of the legislature. They had done so because they expected the population of the South to grow more rapidly than that of the North. Ironically, that expectation proved wrong: in the early nineteenth century the Northern population—and so Northern representation in the House of Representatives—rapidly outran that of the South. As a result, the Senate, with the equal representation of states that the Southern delegates so opposed, proved the most important branch of the legislature for the cause of "Southern rights."

How would the legislators be chosen? According to the Virginia Plan, the people would elect the lower house, which would then elect the upper house from candidates nominated by the state legislatures. The convention agreed that the House of Representatives should be popularly elected: that, Madison argued, would help estab-



William Jackson, secretary of the Convention. Library of Congress.

lish a "necessary sympathy" between the people and their government. Representatives' terms were set at two years, but Senators were given six-year terms in the hope that they would bring "due stability and wisdom" to the legislature. The convention gave state legislatures the right to elect Senators, which made the Senate more independent of the House of Representatives than it would have been under the Virginia Plan and so a more effective check upon that body, but tied the Senate more closely to the states. Later, however, the convention decided that senators would vote individually, not as state units.

Defining the powers of Congress was a task of enormous importance, but one that provoked little controversy. After some deliberation, the convention abandoned the Virginia Plan's vague statement that Congress could act where the states were "incompetent" or where separate state legislation would interrupt "the harmony of the United States" for a very specific summary of Congress's rights. Much of that summary was simply taken from the Articles of Confederation. Congress was also given critical new powers, starting with the all-important "power to lay and collect taxes" and "to regulate commerce," and the major residual authority "to make all Laws which shall be necessary and proper" for carrying out "all . . . Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof." It was denied certain powers—to pass bills of attainder or ex-post facto laws, for example. But the prohibitions on the states were even more important. The states were denied the right to "coin Money; emit Bills of Credit; make any thing but gold and silver Coin" legal tender, or pass laws "impairing the Obligation of Contracts," all of which they had done in the 1780s, undermining the rights of property and provoking fear for the future of the republic. In the end, the powers of the states were so severely curtailed and those of Congress so enhanced that, Madison noted, the central government would hold "powers far beyond those exercised by the British Parliament, when the States were part of the British Empire."

The convention quickly decided to invest the executive power—Article II of the constitution—in a single person, despite the objections of Edmund Randolph. Had it thereby created an "elective Monarchy" or, as Wilson argued, a responsible public servant who would be a "safeguard against tyranny"? Unlike a king, the president would be impeachable, and so removable from office for violations of his trust. The convention also set the president's term of office at seven years, after which he could not be re-elected. Gradually, however, the president was given far more than the "general authority to execute the National laws" and the other "Executive rights vested in Congress by the Confederation" that the Virginia Plan mentioned. The president could veto acts of the legislature (though that veto could be over-ridden by a two-thirds vote in Congress), and he could do so by himself, without the "Council of Revision" specified in the Virginia Plan. He would be "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States." With the advice and consent of the Senate, he could make treaties and appoint ambassadors, judges, and other federal officers. A seven-year term seemed too long for so powerful an executive. In part for that reason, the convention cut it to four years and eliminated the ban on re-election.

The Virginia Plan's provision for letting the legislature elect the president also seemed increasingly unsatisfactory given the convention's inclination to make the president so powerful. Election by Congress would lead to "cabal and corruption." Moreover, as Madison noted, experience in the states "had proved a tendency in our governments to throw all power into the Legislative vortex." State executives were "in general little more than Cyphers; the legislatures omnipotent." Clearly "the preservation of Republican Gov[ernmen]t . . . required" that the executive provide an "effectual check . . . for restraining the instability & encroachments of the legislature." It seemed unlikely that the executive could be adequately independent of the legislature to provide such a check if it were elected by Congress.

But how else could the president be elected? By the people, James Wilson argued; but others said the candidates would be unknown to the people at large. That problem was, Wilson said, "the most difficult of all on which we have had to decide." It was resolved, finally, though not entirely satisfactorily, by entrusting election of the president to a body of electors equal to the number of senators and representatives states were entitled to send to Congress who would be chosen according to a method defined by their state legislatures. The electors would meet in their states and vote for two persons; the ballots would be collected and counted by Congress. Later, with the development of political parties, presidential electors would be elected by popular vote rather than by the state legislatures and all of a state's electoral votes would go to that candidate who won a majority of popular votes within the state. The states then became a much more prominent part of presidential elections than the delegates at Philadelphia had expected.

Under the Virginia Plan, the judicial power—Article III of the constitution—would have consisted of "one or more supreme tribunals" and "inferior tribunals . . . chosen by the National Legislature." Instead the convention called for a single supreme court and "such inferior Courts as the Congress may from time to time ordain and establish." Judges would, moreover, be chosen by the president with the Senate's consent, not by the legislature. In the constitution, as in the Virginia Plan, the independence of judges would be secured by giving them tenure in office during good behavior, and forbidding the reduction of their salaries while they remained on the bench.

The convention also adopted a critical passage, slightly revised, from the New Jersey Plan, declaring that the constitution as well as laws and treaties made under its authority were "the supreme Law of the Land" and binding state judges to uphold them, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." That, in effect, provided an effective substitute for the Virginia Plan's congressional negative on state laws, which critics had condemned as impractical. There would, they argued, be too many laws for Congress to review, and the proposal "would disgust all the States." "A law that ought to be negatived will be set aside in the Judiciary departm[en]t," Gouverneur Morris said, "and if that security should fail, may be repealed by a Nation[a]l law." Madison remained unconvinced; a congressional veto of state laws still seemed to him "essential to the efficacy & security of the Gen[era]l Gov[ermen]t." Virginia, Massachusetts, and North Carolina were in the minority when the convention agreed to deny Congress that power.

Finally, the Virginia Plan proposed that the convention's recommendations "be submitted to an assembly or assemblies . . . expressly chosen by the people, to consider & decide thereon." The convention agreed, and provided further that when nine state conventions had ratified the constitution it would go into effect over the people of those states (Article VII). The fate of the constitution would not therefore be decided by the state legislatures which, as Rufus King noted, lost power under its provisions and so would "be most likely to raise objections." Nor would a single state, or even four states, have power to block the constitution's establishment. When, moreover, nine states had ratified, the pressure on the others (which were expected to include New York and Virginia) would be intense: they would have to decide not whether they preferred the Articles of Confederation or the constitution, but whether they would join the new-formed nation or remain apart from it.

Most important, the ratification provisions assured that the new government would be firmly founded upon "the supreme authority of the people themselves." A system of government ratified by the legislatures, Madison argued, could be at best a league or treaty, like the Articles of Confederation; the authority of "a *Constitution*" had to be "founded on the people." Thus the opening words of the new constitution: "We the people of the United States . . . do ordain and establish this Constitution for the United States of America."

A New Form of Government

The convention had accomplished much of what it set out to do. It had divided power between the states and the nation, taking from the states those powers they had abused in the past, and creating a central government with power sufficient to serve the needs of the

At each step in its proceedings the convention drew on the lessons of history, including that of the Confederation and the American state constitutions. "Experience must be our only guide," John Dickinson had said; "Reason may mislead us."

Union. In designing the new central government, the convention also created independent executive and judicial branches to check the power of the legislature. At each step in its proceedings the convention drew on the lessons of history, including that of the Confederation and the American state constitutions. "Experience must be our only guide," John Dickinson had said; "Reason may mislead us."

But what kind of government had the convention adopted? Not a "federal" government in the sense of a Confederacy, or a "consolidated" national government. Most delegates agreed on the need for strengthening the central government and believed they could do that safely. The history of all previous confederacies had proven, Madison claimed, that such governments were endangered more by "anarchy" than "tyranny," by the "disobedience of ... members" rather than "usurpations of the federal head." The convention was nonetheless forced repeatedly to negotiate compromises between those who thought the states "should be considered as having no existence" with respect to the general government, and those who sought repeated affirmations of the states' continued importance. Even when the delegates agreed to eliminate the word "national" from the constitution, they did so for differing reasons. The result was a system of government that conformed to no previous model and which satisified no one completely. To Madison and Wilson, for example, the constitution's provision for equal state representation in the Senate constituted a new "vice" of the American system, an error of design that would lead to "disease, convulsions, and finally death itself." The constitution included no reference to a "perpetual Union," as had the Articles of Confederation, perhaps because its future seemed so troubled.

On the final day of the convention, Benjamin Franklin, the convention's only octogenarian, offered his colleagues counsel. "I confess," he said in a speech read for him by James Wilson, "that there are several parts of this constitution that I do not at present approve, but ... the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others." A general government, he thought, was necessary for the United States, and he questioned, "whether any other Convention we can obtain, may be able to make a better Constitution.... Thus I consent ... to this Constitution because I expect no better, and because I am not sure that it is not the best. The opinions I have had of its errors, I sacrifice to the public good." He urged the other delegates to do the same, to "doubt a little" of their "own infallibility," and work "heartily and unanimously" for the constitution's ratification.

Three of the delegates who remained in Philadelphia rejected Franklin's advice—Elbridge Gerry of Massachusetts and two Virginians, Edmund Randolph and George Mason, whose discontent witnessed how far the convention had moved from the original Virginia Plan. However, thirty-nine signed the constitution and campaigned for its ratification (as, in the end, did Randolph).

In the state ratification debates, moreover, the Federalists, under the leadership of James Wilson, developed a coherent justification of the new American governmental system. Provisions hammered out as compromises emerged as positive virtues. Neither the states nor the central government was "supreme," as the Virginia Plan had put it, because in the American Republic the people alone were sovereign. And a sovereign people could parcel out responsibility for state and national government, creating separate, concurrent jurisdictions over distinct spheres that could "no more clash than two parallel lines can meet," each with complete authority for the tasks delegated to it. This conception of the state and central governments as independent agencies of the people, separate but equal, provided the intellectual foundation for modern American federalism, a system of government which, as Madison understood, had no historical precedent and so was a "new Creation."

After 200 years, it is tempting to celebrate the Federalists' intellectual and political accomplishments as if they were the end of the story. With justice, it should also be remembered that the conclusions Madison and his colleagues drew from past history in the 1780s were brought into question by the experience of the 1790s: eleven years after the convention "the father of the Constitution" had come to fear tyranny from the central government far more than anarchy, and he proposed, in the Virginia Resolutions of 1798, a role for the states in judging the constitutionality of Congress's laws. In the end, the future of the republic was decided not at Philadelphia so much as at Appomattox, by a war fought for much the same reason as that for which the constitutional convention met—to assure that "government of the people, by the people, for the people, shall not perish from the earth."

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Society and Republicanism: America in 1787

by JAMES A. HENRETTA

"In all times," John Winthrop told the first Puritan migrants to the Massachusetts Bay colony in 1630, "some must be rich, some poor, some high and eminent in power and dignity, others mean and in subjection." A century and a half later his descendant James Winthrop likewise pointed to the power of the rich and well-born. "Every society naturally divides itself into classes," he wrote in 1788, and men who compose "the *natural aristocracy* ... will command a superior degree of respect." John Winthrop praised rule by the privileged few, but his descendant condemned it. In 1788 James Winthrop emerged as a leading Massachusetts Anti-Federalist. He opposed ratification of the Philadelphia Convention because its system of "government is so constituted as to admit but few to exercise to the powers of it." In his eyes, it did not provide "for a genuine and fair representation of the people."

This dialogue between the Winthrops underlines the radical nature of the American Revolution. The repudiation of British rule ended the traditional colonial social and political order. The Declaration of Independence spoke of human equality, of the right of all people to enjoy "life, liberty, and the pursuit of happiness." Ordinary Americans quickly used their new-found freedom. In 1778 voters in James Winthrop's Massachusetts rejected a state constitution proposed by the Assembly. "Said Constitution and Form of Government," the residents of the small western town of Greenwich explained,

> Entirely Divests the good People of this State of Many of the Privileges which God and Nature has Given them ... and [gives] away that Power to a few Individuals, which ought forever to remain with the People....

The republican doctrine of popular sovereignty placed ultimate authority in the hands of "the People." But who were "the People"? Did "the People" include women as well as men? Black slaves as well as free whites? Did the republican doctrines of political liberty and legal equality imply social equality as well?

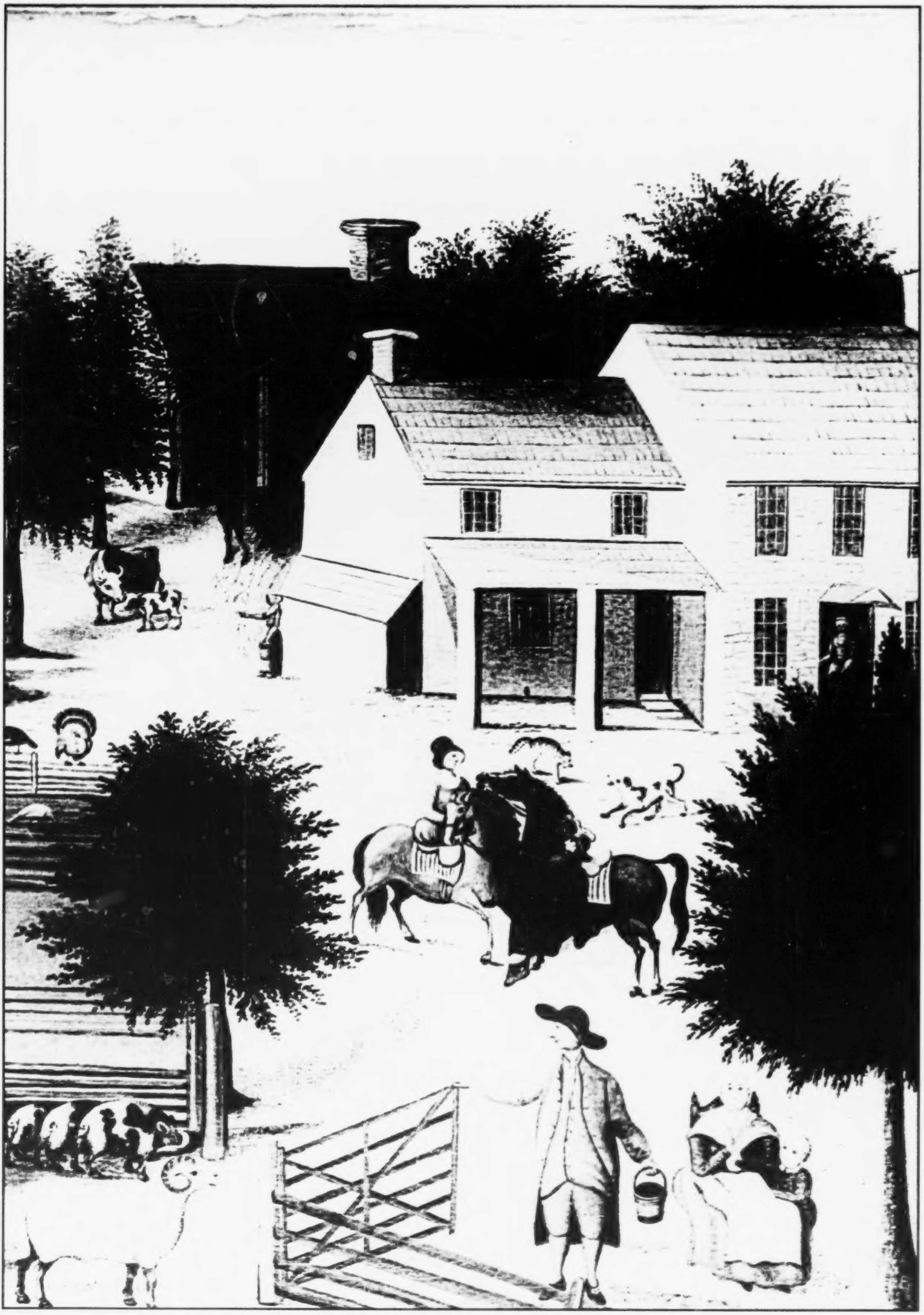
Between 1776 and 1789 Americans passionately debated these questions. The fate of the revolution—and the republican experiment—seemed to hang in the balance. This extraordinary intellectual and political ferment stemmed in part from the contradictions within republican ideology. Some Americans gave an "aristocratic" definition to republicanism; they championed rule by the "natural aristocracy." Other citizens argued for a "democratic" republic characterized by greater legal and political equality. The harsh economic conditions of the 1780s increased social tensions and raised the stakes of this debate. The resulting political factionalism led to the writing of Philadelphia Constitution. These ideological and economic conflicts likewise shaped the debates over ratification. In particular, they explain Madison's astute analysis of social and political factions in *Federalist* No. 10.

Republicanism

Europeans were especially conscious of the relationship between the social order and republicanism. In his famous *Letters from an American Farmer* (1782), the French essayist Hector St. John de Crevecoeur explained that Europe was ruled by "great lords who possess everything, and a herd of people who have nothing." In America, historical development had eroded the foundations of traditional hierarchical society; here, there "are no aristocratical families, no courts, no kings, no bishops.... " Europeans also pointed out that the American Revolution had instituted legal equality, further undermining social privilege and hierarchical authority. "The law is the same for everyone both as it protects and as it punishes," one visitor noted. "In the course of daily life everyone is on the most perfect footing of equality."

Like James Winthrop, Europeans were well aware that legal equality had not prevented the formation of social classes in the United States. "Wealth, power and higher education rule over need and ignorance," one visitor declared bluntly. Yet class divisions in America differed from those in Europe. The colonies had lacked—and the republican state constitutions prohibited—a legally privileged class of nobles. The absence of an aristocracy of birth encouraged many Americans to seek upward mobility and to create class divisions based on achievement. "In Europe to say of someone that he rose from nothing is a disgrace and a reproach," an aristocratic Polish visitor explained in 1798. "It is the opposite here. To be the architect of your own fortune is honorable. It is the highest recommendation."

Some Americans disagreed. Many Patriot leaders held "aristocratic-republican" values. These men and women preferred a society based on inherited wealth and family status. They questioned the wisdom of a social order based on equality of opportunity and financial competition. During the War many small-scale traders had reaped windfall profits from military supply contracts and sharp dealing in scarce commodities. "Fellows who would have cleaned my shoes five years ago, have



David Twining's farm in Buck County, Pennsylvania, by Edward Hicks. Abby Aldrich Rockefeller Folk Art Center, Colonial Williamsburg Foundation.

amassed fortunes, and are riding in chariots," complained Boston's James Warren in 1779. Such envious sentiments were echoed by established families who wished to preserve their social and political dominance. Many American political leaders likewise lamented the demands for political equality generated by the Revolution. "Depend upon it, Sir," the aristocratic-republican John Adams declared in a private letter, "it is dangerous . . . to alter the qualifications of voters." If property qualifications for voting were lowered, he warned,

> there will be no end to it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all the acts of state.

The result would be "to confound and destroy all distinctions and prostrate all ranks to one common level." Like John Winthrop, John Adams still believed that some men were high and eminent, while others were lowly and should be in subjection.

Women and the Family

Nonetheless, republican ideology challenged all social privilege, even the patriarchal relations of power within the family. Previously, religious writers had accorded preeminent authority to the male head. "The Husband is to rule his Family and Wife . . . ," Boston minister Benjamin Wadsworth had declared in *The Well-Ordered Family* (1712). "Wives submit your selves to your own Husbands, be in subjection to them." In 1776, Abigail Adams questioned this system of patriarchal authority. She urged her husband John and the other men in the Continental Congress to "Remember the Ladies, and be more generous to them than your ancestors [were]." "We know better than to repeal our Masculine system," the future president replied with jocular condescension, "in Practice you know we are the subjects. We have only the name of Masters."

In fact, legal rules ensured male dominance in the new republican family. Statutes enacted by state legislatures perpetuated traditional English common law restrictions on married women. William Blackstone, the famous English jurist, had pointed out that under common law, "the very being or legal existence of the woman . . . during marriage is incorporated and consolidated into that of the husband." This legal condition of "coverture" limited the rights of married women to own property, to sue, or to make contracts and wills. These common law rules deprived American women of most legal rights until the 1840s, when many state legislatures passed Married Women's Property Acts. Even then, less severe forms of legal inferiority restricted women's lives through most of the twentieth century.

Yet "democratic-republican" ideology encouraged demands for the legal emancipation of women even as republican practice denied them. In 1779, Judith Sargent Murray of Gloucester, Massachusetts, composed an essay "On the Equality of the Sexes" and published it in 1790. Murray stressed the importance of mutuality in marriage: "Mutual esteem, mutual friendship, mutual confidence, *begirt about by mutual forbearance*." Similar sentiments were widespread among young, well-educated, upper-class women. They tried to reconcile the republican doctrine of equality with the cultural reality of female subordination. "I was never of opinion that the pursuits of the sexes ought to be the same," seventeen-year old Eliza Southgate of Maine wrote to a male cousin, "each [sex] ought to have a separate sphere of action." "Yet to cultivate the qualities with which we are endowed [she continued] can never be called infringing the prerogatives of man." "The men say we have no business" with politics, Eliza Wilkinson of South Carolina complained, "but I won't have it thought that because we are the weaker sex as to bodily strength we are capable of nothing more than domestic concerns. They won't even allow us liberty of thought, and that is all I want."

A few American public leaders responded positively to female demands for greater equality, but usually with male needs in mind. In his *Thoughts on Female Education* (1787), the Philadelphia physician Benjamin Rush advocated the intellectual training of women, so they would "be an agreeable companion for a sensible man." Rush and other men of affairs likewise praised "republican mothers" who instructed "their sons in the principles of liberty and government."

Ultimately, the concept of "republican motherhood" altered the character of the family and of American society. The main impetus came from religion. Beginning in the 1790s, Christian ministers celebrated women's role as moral educators. "Preserving virtue and instructing the young are not the fancied, but the real 'Rights of Women'," the Reverend Thomas Bernard told the Female Charitable Society of Salem, Massachusetts. "Give me a host of educated pious mothers and sisters," echoed Thomas Grimké, a South Carolina minister,

> and I will do more to revolutionize a country, in moral and religious taste, in manners and in intellectual cultivation than I can

Republican ideology challenged all social privilege, even the patriarchal relations of power within the family.

> possibly do in double or triple the time, with a similar host of men.

Grimké did not exaggerate. Women played a central role in the Second Great Awakening (1790–1830), the evangelical revivals that made Christianity an important part of the emerging American national character. Many married women now used their moral position as "guardians of virtue" to achieve a position of near-equality within the home. Women trained in religious academies entered the paid work force as teachers, while other women actively campaigned for social reform and for women's rights. Republican ideology and religious idealism had transformed the traditional cultural rules governing the status of women in American society.

Slavery and Property

Democratic-republicanism and Christian idealism also threatened the institution of slavery, a prime feature of the American legal order. In 1787, no fewer than 750,000 blacks (20 percent of the entire population of the United States) were held in hereditary bondage. But now their servile status was the subject of political debate. In 1784, Virginia Methodists condemned slavery, using both religious and republican arguments. They declared that slavery was "contrary to the Golden Law of God on which hang all the Law and Prophets, and the unalienable Rights of Mankind, as well as every Principle of Revolution."

These arguments laid the intellectual basis for black emancipation in the northern states, where there were relatively few slaves. By 1784, Massachusetts, Pennsylvania, Connecticut, and Rhode Island had either abolished slavery or provided for its gradual end. Two decades later, all states north of Delaware had adopted similar legislation.

The abolition of slavery in the North exposed additional contradictions within republican ideology. American patriots had fought the British not only for their lives and liberty, but also for the rights of private property. Indeed, the three values were closely linked in republican theory. The Massachusetts Constitution of 1780 protected every citizen "in the enjoyment of his life, liberty, and property, according to the standing laws." The Virginia Bill of Rights went further; it asserted that the "means of acquiring and possessing property" was an inherent right. Like John Adams, the authors of most state constitutions believed that only property owners could act independently and restricted voting rights to those with freehold estates. For them, republicanism was synonymous with property rights.

There was the rub. For slaves were property. The abolition of slavery in Massachusetts in 1784, James Winthrop pointed out, meant that "a number of citizens have been deprived of property formerly acquired under the protection of law." To protect white property rights, the Pennsylvania Emancipation Act of 1780 did not free slaves already in bondage. The Act awarded freedom only to slaves born after 1780—and then only after they had served their mothers' masters for twenty-eight years. In fact, American republican ideology was ultimately derived from ancient Greece and Rome and was fully compatible with slavery. "As free men," the poet Euripedes had written of his fellow citizens in the ancient Greek republics, "we live off slaves."

This aristocratic-republican ideology combined with economic self-interest to prevent the emancipation of slaves in the South. Slaves accounted for 30 to 60 percent of the southern population and represented a huge financial investment. Most southern political leaders were slaveowners, and they actively resisted emancipation. In 1776, the North Carolina legislature condemned the actions of Quakers who freed their slaves as "highly criminal and reprehensible."

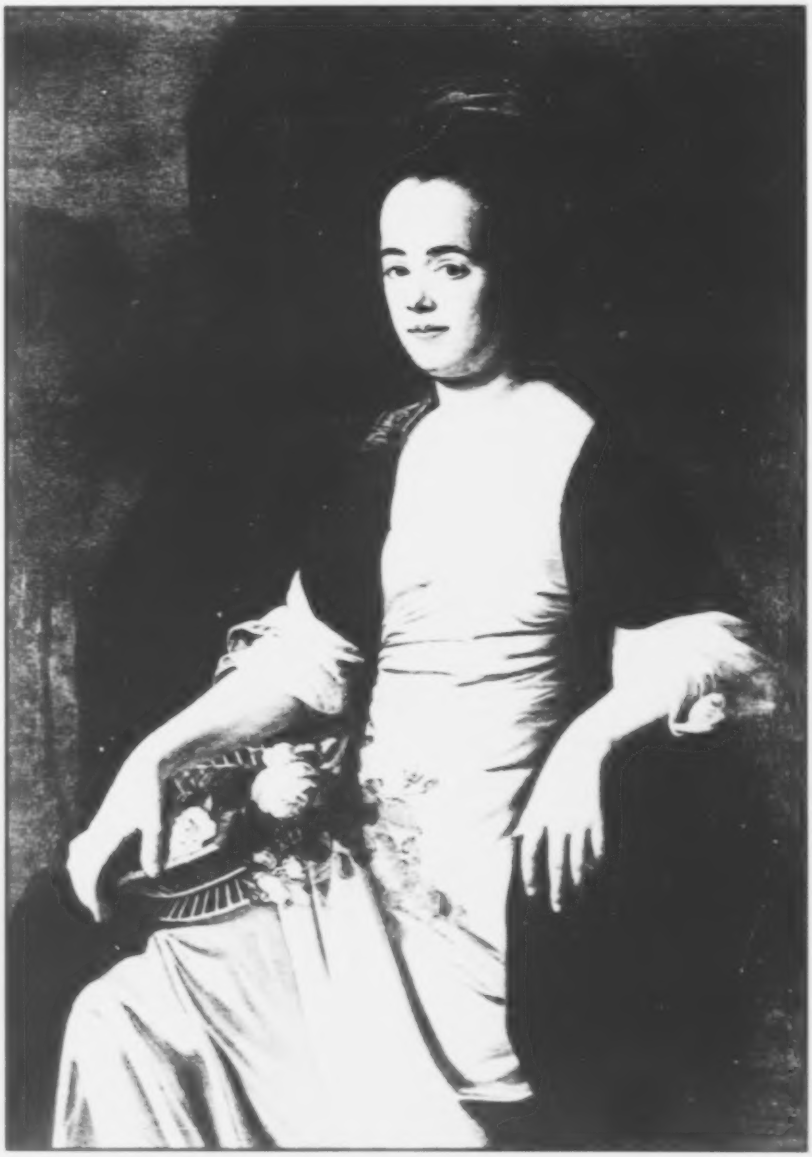
Understandably, southern blacks sought freedom on their own. Two white neighbors of Richard Henry Lee, a signer of the Declaration of Independence, lost "every slave they had in the world," as did nearly "all of those who were near the enemy." More than five thousand blacks left Charleston, South Carolina, with the departing British army. Other American slaves bargained wartime loyalty to their patriot masters for a promise of liberty. Using a Manumission Act passed in 1782, Virginia planters granted freedom to more than ten thousand slaves.

Yet black emancipation in the South was doomed even before the expansion of cotton production gave slavery a new economic rationale. The rice planters of Georgia and South Carolina strongly opposed emancipation throughout the revolutionary era. Their demands at the Philadelphia Convention resulted in a clause (Article I, Section 9) that prevented Congress from prohibiting the transatlantic slave trade until 1808. By that time, southern whites had imported an additional 250,000 Africans—as many slaves as had been brought into all the mainland colonies between 1619 and 1776.

Nonetheless, republican ideology and evangelical Christianity profoundly affected the lives of many black Americans. By 1787, thousands of blacks in the Chesapeake states had joined Baptist and Methodist churches. The Christian message promoted spiritual endurance among some blacks and prompted others to resist slavery by force. In 1800, Martin and Gabriel Prosser plotted a slave uprising in Richmond, Virginia. They hoped to capture the governor and to seize the arms stored in the state capital. Their "cause was similar to the Israelites'," Martin Prosser told his followers.

> I have read in my Bible where God says, if we worship him, we should have peace in all our land and five of you shall conquer a hundred, and a hundred of you a hundred-thousand of our enemies.

White Virginians nipped the insurrection in the bud, but it renewed their fears about the democratic implications of republicanism. During the War, slaves had "fought [for] freedom merely as a good," St. George Tucker suggested, but now they "claim it as a right." "Liberty and equality have brought this evil upon us," a letter to Virginia *Herald* argued following Gabriel's Rebellion, for such doctrines are "dangerous and extremely wicked in this country, where every white man is a master, and every black man is a slave."



Judith Sargent Murray *by J. S. Copley. Frick Art Reference Library.*

Artisans and Farmers

Democratic-republicanism appealed not only to women and blacks but also to artisans and yeomen farmers. These men formed the vast majority of the voting population. Prior to Independence, they usually elected leading landowners or merchants to political office and deferred to their superior social status. Religious conflicts during the First Great Awakening (1740 to 1765) partially undermined these deferential attitudes. As Baptist leader Isaac Backus explained in 1768, "the common people [now] claim as good a right to judge and act for themselves in matter of religion as civil rulers or the learned clergy."

Political revolution translated these anti-elitist sentiments into ringing affirmations of popular power. In 1776, the voters of Mecklenberg County told their delegates to the North Carolina Constitutional Convention to "oppose everything that leans to aristocracy, of power in the hands of the rich and chief men exercised to the oppression of the poor." The new state constitutions dramatically increased the political influence of ordinary citizens. Lower property qualifications for voting gave urban artisans greater power; and reappointment of the state legislatures on the basis of population gave greater representation to ordinary western farmers.

The results were dramatic. Before 1776, only 17 percent of northern assemblymen were "middling" farmers and artisans, those with tax assessments of less than $2,000; by the 1780s these social groups constituted no less than 62 percent of the representatives. The democratic-republican thrust of the American revolution had undermined the hierarchical social order of John Winthrop and had created state governments in which, as James

The republican ideology of liberty and equality had raised the expectations of a majority of "the People" while leaving them in an inferior social position.

Winthrop put it, there could be "a genuine and fair representation of the people."

Democratic-republican demands for greater equality contributed to the intense political and constitutional struggles of the 1780s, as did an overcrowded agricultural economy. Thousands of white tenant farmers yearned to escape the hierarchical rural society of the Chesapeake states, while landlords sought to keep them at home. "Boundless settlements," a letter in the Maryland *Gazette* warned in 1785, will open "a door for our citizens to run off and leave us, depreciating all our landed property and disabling us from paying taxes."

A rapidly growing population pressed on landed resources in New England as well. In the typical town of Kent, Connecticut, one hundred fathers and 109 adult sons lived on the town's 103 farmsteads. Previous generations of Kent parents had subdivided their lands to provide for their many offspring; now their small farms would support only a single heir. Yeomen families faced declining prospects and even the loss of their land. "The *mortgage of our farms*, we cannot think of," the farmers of Conway, Massachusetts protested,

> to be *tenants* to *landlords*, we know not who, and pay rent for lands *purchased with our money*, and converted from howling *wilderness*, into fruitful fields, by the *sweat of our brow*, seems . . . truly shocking.

To provide for their families in these hard times, many rural residents turned to household manufactures. In the small village of Hallowell, Maine, the daughters of Martha Ballard learned to weave, as did most of the town's young women. The resulting surge in household cloth production dramatically reduced American dependence on British manufactures. During the Revolution, artisans in the town of Lynn, Massachusetts, had likewise raised their output of shoes. By 1789, the town turned out 175,000 pairs of shoes each year, and by 1800, no fewer than 400,000 pairs. The efforts of these women and men laid the foundation for American self-sufficiency and prosperity. As Alexander Hamilton noted proudly in 1792, the countryside was "a vast scene of household manufacturing . . . in many cases to an extent not only sufficient for the supply of the families in which they are made, but for sale, and even, in some cases, for exportation."

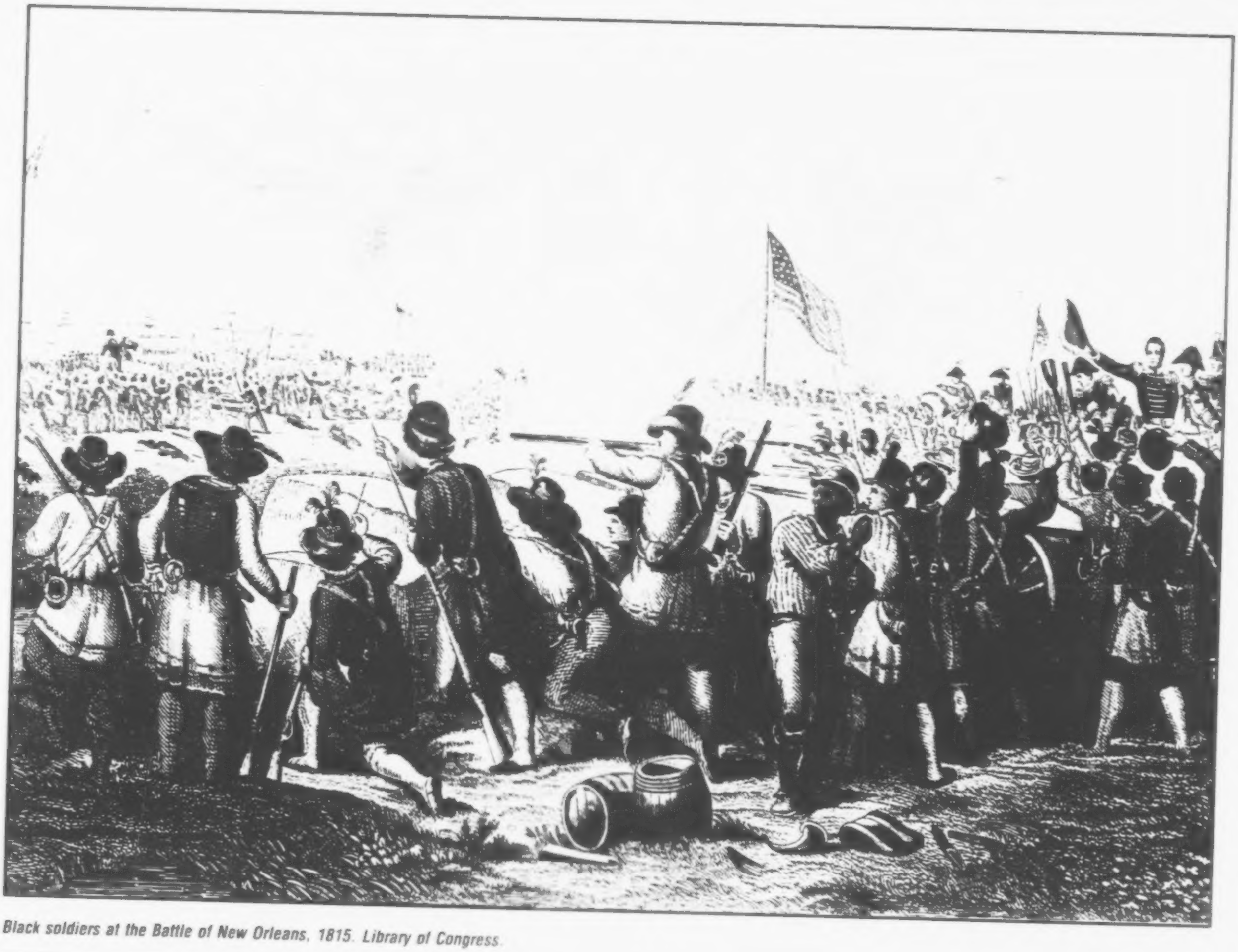
Merchant entrepreneurs such as Ebenezer Breed of Lynn, Massachusetts, directed many of these rural enterprises. They employed farm women and children to sew the soft uppers of shoes or to spin yarn, and rural males to weave cloth for market sale. Their entrepreneurial activities helped many Americans to maintain their standard of living during the commercial and agricultural recession of the 1780s.

This new capitalist system of production for market also increased economic conflicts. Rural workers and merchant entrepreneurs were indispensable to each other, but their interests—like those of merchants and farmers—were not always identical. Many backcountry farmers went into debt to expand household production or provide farmsteads for their children. As debts increased, so too did defaults and law suits. The courts directed sheriffs to sell the property of bankrupt farmers and artisans to pay merchant creditors and court costs.

Commercial debt had been a feature of American life since the 1760s. "Mark any Clerk, Lawyer, or Scotch merchant," warned North Carolina farmer Herman Husband. "We must make these men subject to the laws or they will enslave the whole community." Actually, merchants usually had the law on their side so, during the 1760s, Husband and his followers intimidated judges, closed courts by force, and broke into jails to free their arrested leaders. Anti-merchant sentiment during the 1770s pushed forward the independence movement in Virginia, where Scottish traders had extended credit to more than 32,000 tobacco planters. And it appeared yet again in western Massachusetts in the 1780s. Between 1784 and 1786, the Hampshire County Court heard 2,977 debt cases. Angry Massachusetts farmers defended their property from seizure by closing the courts.

Farmers—like women and slaves—now used the democratic-republican heritage of the American revolution to justify their actions. They met in extra-legal conventions and spoke of the "Suppressing of tyrannical government." Led by Revolutionary War veteran Captain Daniel Shays, these farmers eventually rose in outright rebellion. As the Massachusetts aristocratic-republican Fisher Ames lamented, "The people have turned against their teachers the doctrines which were inculcated in the late revolution."

The republican ideology of liberty and equality had raised the expectations of a majority[4] of "the People" while leaving them in an inferior social position. In 1787, American women were still legally subordinate to males, and most blacks were still legally enslaved. Legally-mandated taxes and court proceedings threatened the livelihoods of thousands of yeomen farmers and artisans. Yet "the People" also included lawyers like Ames and James Winthrop, established merchants like Bostonian



Black soldiers at the Battle of New Orleans, 1815. Library of Congress.

James Warren, slaveowning planters like Thomas Jefferson, and shoe-industry entrepreneur Ebenezer Breed. As James Madison astutely argued in *Federalist* No. 10,

> A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments.

Madison's goal at the Philadelphia Convention had been to create a public arena in which this "variety of parties and interests" could pursue their own goals without invading "the rights of other citizens."

Participants and Spectators

Like James Winthrop, many Americans doubted that the Philadelphia Constitution represented the correct constitutional formula. The Constitution was ratified only by narrow majorities in the major states of Virginia (89 to 79), Massachusetts (187 to 168), and New York (30 to 27). Yet by July 4, 1788, the Constitution had become the supreme law of the land, and thousands of Philadelphians turned out for a celebratory parade. A band played 'The Federal March," and a float carried a oversized framed reproduction of the Constitution itself.

The parade also demonstrated social and political divisions outlined in Madison's *Federalist* No. 10. Most of the five thousand participants marched not as individual republicans, but as members of distinct occupational or social groups. Farmers cast seed before them. Weavers operated a loom on their horse-drawn float, while printers ran a press. Behind the floats marched groups of artisans and professionals—barbers, hatters, lawyers, clergymen, and political leaders. Most blacks, women, and white laborers watched from the sidewalks.

All of these Americans joined together to cheer their republican revolution and their new national constitution. But many remained as spectators, both of the parade and of the political process. And those citizens who participated did so with a heightened sense of their respective social identities and economic interests. The United States began its history with a society legally divided by gender and race, and with a polity divided by class position and economic interest.

Two hundred years later, Americans remain sharply divided by race and by economic and social inequalities, although united by their Constitution and their republican ideology. Now, as then, the meaning of liberty and equality remains the subject of intense debate and of political struggle.

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DOCUMENTS

New Documents, New Light on the Philadelphia Convention

by JAMES H. HUTSON

> *Curiosity and the love of information you know has no bounds. My curiosity was highly gratified the other day by clasping the hand of a woman who died many hundred years ago. The ancient Egyptians had an art, which is now lost out of the world, of embalming their dead so as to preserve the bodies from putrification many of which remain to this day. From one of those an arm has lately been cut off and brought to this city. The hand is intire. The nails remain upon the fingers and the wrapping cloth upon the arm. The flesh which I tried with my knife, cuts and looks much like smoked beef kept till it grows hard.*

So wrote Oliver Ellsworth to his wife on July 21, 1787, from Philadelphia where he sat as a Connecticut delegate to the Constitutional Convention.

Ellsworth's letter and the others in this article will be included in a supplement to Max Farrand's *The Records of the Federal Convention of 1787* which will be published by Yale University Press in 1987.* The drafters of the Constitution were men of their times. The letters they wrote during their stay in Philadelphia, and other contemporary documents, newly discovered, reveal their tastes and attitudes and, in a larger sense, the climate of opinion in the late eighteenth-century world from which the Constitution emerged.

Consider the following entry in the June 22 minutes of the Philadelphia Street Commissioners:

> *An order drawn on the Treasurer in favour of Michael Wartman for the Sum of fifteen Pounds on Account for Work done with his Teams at the Common Sewer in Fourth Street . . .*
>
> *Upon Complaint to this Board of the very great difficulty arising from the Carriages passing in front of the State House, so that the Honbl. Convention now setting there, are much interrupted by the Noise of the same——Resolved, that a Quantity of Gravell now haulling out of the Sewer in Fourth Street, be laid on Chestnut Street, in front of the State House.*

The resolution is important in that it confirms the truth of a tradition that the streets around the Pennsylvania State House were treated to deaden the sound that was distracting the Convention, although it has not been known that the contents of a sewer were used as a baffle.

Equally interesting in illuminating the nature of the environment in which the delegates worked is an entry in the Street Commissioners' minutes immediately following the request for noise abatement. Numerous citizens, it was reported, had complained to the commissioners about large pools of water standing stagnant in the streets of Philadelphia. That stagnant water bred mosquitos that spread yellow fever was not understood in the eighteenth century, but the people of Philadelphia sensed that there was a noxious relationship between standing water and the diseases which threatened the health of the city during the summer months. The sickliness of summers in Philadelphia was known throughout the colonies and at least one potential delegate, Erastus Wolcott of Connecticut, refused to attend the Convention because he did not want to "hazzard his Life" in the Pennsylvania capital. Others were also anxious about their health—Daniel Carroll of Maryland stayed in Germantown because it was "high, healthy, and at a suitable distance" from the city. The delegates as a group were remarkably free from illness during the summer of 1787, but not so the children of Philadelphia, who seem to have suffered from an undiagnosed epidemic while the Convention was in session. A series of letters from Elbridge Gerry to his wife provide information about the social context of the Convention. On August 10, Gerry informed Mrs. Gerry, who had retreated with the couple's baby daughter to the supposedly more salubrious air of New York, that a friend

> *made a particular Enquiry for yourself and the baby. She was glad to hear you were both well and wished to see you but said you had acted judiciously in not returning this Month, for it had been very sickly since we left the City with young Children, a great Number of whom had*

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*The author would like to acknowledge the assistance of the National Endowment for the Humanities, which helped support the research for this volume, and Leonard Rapport, who did much of the archival investigation.

> *dyed. There was scarcely a Day she said passed without her seeing some carried by her Door.*

The catastrophe among the city's children may have precipitated the most shocking event of the summer: the murder of a "witch" by a street mob. The alleged witch, an old woman named "Korbmacher" (basketmaker), was subjected to the ancient ritual of forehead slashing—supposedly an antidote to her evil powers—on May 5, the day James Madison arrived in Philadelphia. In mid-July she was carted through the streets and "pelted as she passed along," apparently with stones and refuse, an ordeal from which she died eight days later. Her attackers were whipped up by a woman who subsequently testified in court "her belief that her only child sickened and died under the malignant influence of a charm" cast by the "witch." Members of the mob were, perhaps, inflamed by the loss of *their* children.

Edmund S. Morgan, who described the travail of Korbmacher, asserted that Washington, Madison, and the other framers must have been aware of the "witch" death, for it was reported and denounced in all of the city's newspapers. Remarkably, this outbreak of superstition took place at the same moment that the Convention delegates were treated to a display of the latest in "high tech" engineering.

On August 22, William Samuel Johnson wrote John Fitch as follows:

> *Dr. Johnson presents his Compliments to Mr. Fitch and assures him that the Echibition yesterday gave the Gentlemen present much satisfaction. He himself, and he doubts not the other Gentlemen, will always be happy to give him every Countenance and encouragement in their Power, which his Ingenuity and Industry entitles him to.*

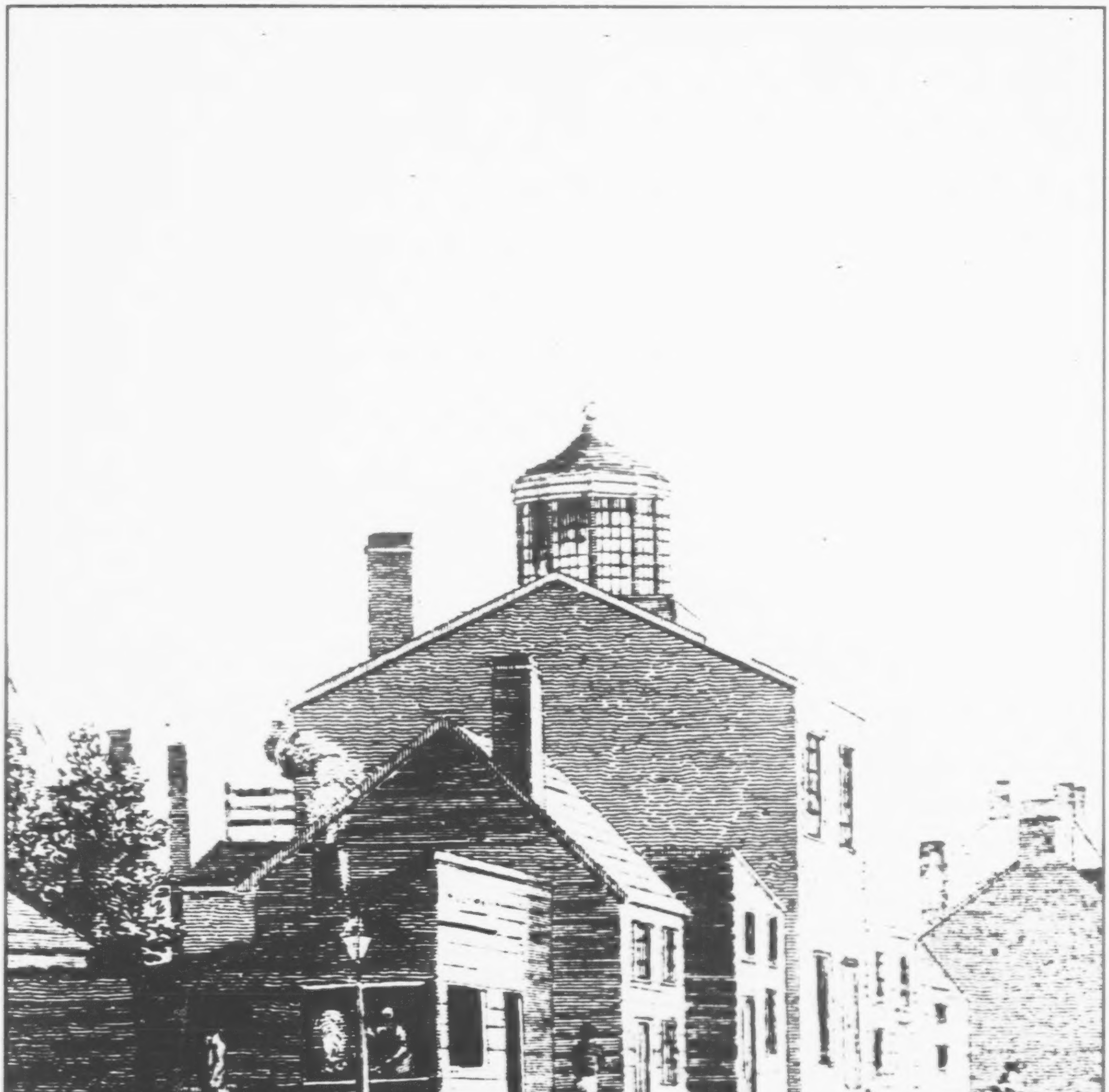
The "exhibition" to which Johnson referred was a demonstration on the Delaware River of Fitch's steamboat. According to Fitch, almost all of the delegates watched the steamboat go through its paces; two of them, Robert Morris and James Wilson, were financial backers.

Slashing the forehead of a witch and seeing a steamboat in action define the range of the world in which the framers operated at Philadelphia. The old and new co-existed in a complex tension. The constitution the delegates wrote reflected these conditions, for it combined old elements of the Articles of Confederation with new elements and conceptions. The complex instrument thus formed troubled some Anti-Federalists, who implied that the delegates must have been bewitched to produce such an "amphibious monster."

If many documents illustrate the milieu in which the Constitution was framed, numerous other documents add to our knowledge of what happened on the Convention floor itself. Gunning Bedford of Delaware played a modest role at the Convention. A hot-tempered man, Bedford lost his temper on June 30 and assailed the larger states whose insistence on proportional representation in both houses threatened, in his opinion, the "degradation" of the smaller states. Rather than succumb to such a fate, Bedford warned (in an intemperate speech for which he later apologized) that the small states would seek assistance abroad: there are "foreign powers who will lead us by the hand," he defiantly asserted. In the document published below, in Bedford's hand and discovered in the collections of the American Antiquarian Society, we see Bedford in a calmer posture, reflecting on the Virginia Plan, introduced by Edmund Randolph on May 29. Bedford conducts a dialogue with Randolph, summarizing the points the Virginian makes and then responding to them.

Gunning Bedford's Notes on Randolph's Speech,
May 29, 1787

Mr. Randolph
1. Congress unable to prevent War
2. Not able to support war
3. Not able to prevent internal Sedition or rebellion
4. Cant prevent dissentions of one state with another, except as to territory
5. No power to prevent encroachments of the several states on Confederacy
Answer
1st To prevent war Congress must possess wealth and men. Must dispose of her wealth in fortifying herself and must be able to command money and hire men to put herself at all times in a defenceable situation. Cant these



Fifth Street in Philadelphia, 1799. Library of Congress.

objects be attained by a compulsory power in Congress to command money and men from the several States?

2d To support war. Money and men answer this purpose. A compulsory power in Congress will command

3. Cant prevent sedition or insurrection and rebellion. Vest Congress with power to call for troops and to send them into the states where insurrection or rebellion exists. Who to determine which party in the right rebels or the state? Vest Congress with power to determine this question on notice given to the parties.

4. Cant prevent dissentions of one state with another save as to territory. Vest them with this power in all cases either immediately or thro their judiciary.

5. Congress not able to prevent encroachments of the states. Let the boundary be ascertained with precision and let it be determined by the judiciary.

6. Congress cant avail themselves of imposts. Let the general regulation of trade be vested in them.

7. Congress ought to be enabled to prevent emissions of paper money. Let them be vested with such power.

8. No power to erect great works, improve navigation promote agriculture etc. They ought not to have such powers. A state has the right to avail herself of all natural advantages. To erect great works would enable them to draw money independent of the states and would end in aristocracy oligarchy and tyranny.

9. Congress ought to be paramount to state legislatures. Let Congress be empowered to negative all laws that interfere with confederation and if appeal by the state, let the question be determined in the judiciary.

Bedford's views, as revealed in this document, were typical of those of many small state delegates and of his Delaware colleagues, Dickinson and Read, in particular. He—and they—were willing to see a strong national government created with "compulsory power . . . to command men and money," provided that the small states were granted a significant voice in deciding how such a government operated. What is significant about this Bedford document is the degree of power he was willing to grant to the judiciary. Bedford's willingness, as expressed in point nine, to permit the judiciary to be the arbiter between the state and national governments and his reliance on the power of the judiciary in other articles offers support to those who contend that the framers intended that the judiciary play an active role in our polity.

Two newly-discovered documents illustrate the development of the opposition to the Constitution within the Convention. The first document, printed immediately below, is in South Carolina delegate Pierce Butler's hand, but must have been copied, not composed by Butler, for it contains objections to clauses in the Constitution, a single executive, for example, which Butler was on record as favoring. Many of the document's objections appear in expanded form in George Mason's indictment of the Constitution, written on the back of his copy of the report of the Committee of Style and, therefore, the document may represent a summary of Mason's objections as of August 30.

August the 30th

Objections to the Constitution as far as it has Advanced

1st. No privilige is given to the House of Representatives, which by the way are too few, in disposition of money; by way of counter ballance to the permenent condition of the Senate, in the circumstances of duration, power, & smallness of Number.

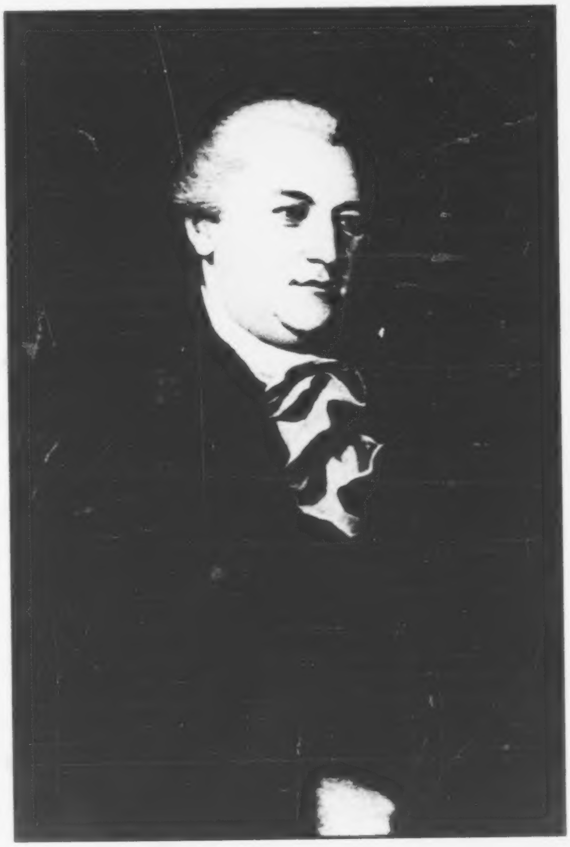
2d. The expulsion of members of the Legislature is not sufficiently Checked.

3d. The inequality of Voices in the Senate is too great.

4th. The power of Raising Armies is too unlimited.

5th. The sweeping Clause absorbs every thing almost by Construction.

6th. No Restriction is made on a Navigation Act and certain Regulations of Commerce.



Gunning Bedford, *portrait by Charles Willson Peale. Architect of the Capitol Collection, Library of Congress.*

7th. The Executive is One.
8th. The power of pardon is Unlimited.
9th. The appointment to Office will produce too great influence in the Executive.
10th. The Jurisdiction of the Judiciary will swallow up the Judiciaries of the States.
11th. Duties on Exports are forbiden but with the assent of the General Legislature of the U.S.

The second "Anti-Federalist" document is definitely a Mason production. James Madison received a copy of it on March 16, 1788, from James McHenry with a note "that it was given to the Maryland delegates for their consideration—with information that if the alterations could be obtained the system would be unexceptionable. Their concurrence and assistance . . . was requested." Madison copied the document and dated it August 31, apparently as a result of information received from McHenry. Madison's copy, in his papers at the Library of Congress, is missing the final two articles in the document printed here. Another copy of the Mason document, missing the last article, has been found in the John Dickinson papers at the Historical Society of Pennsylvania. The copy printed below, the fullest of those known to exist, was found in the Pierce Butler papers at the Library of Congress. It contains some of the objections in the August 30 document, printed above, but introduces others, including a protest against the absence of a council of state, on which Mason expanded in his manifesto on the back of the Committee of Style report, September 12, 1787. That manifesto began by assailing the Constitution for omitting a "Declaration of Rights," the grievance that became the staple of the Anti-Federalist campaign against ratification. That neither the August 30 nor 31 documents complain about the absence of a bill of rights illustrates how late concern over this issue developed at the Convention. During the ratification debates, the Federalists implied that solicitude for a bill of rights was a last-minute invention in the Convention which for that reason was insincere. Whether the proponents of a bill of rights originally lacked conviction can not now be determined. Certainly their concern was, as the new documents demonstrate, very late in developing.

Mason: Alterations Proposed, August 31

The Council of State, instead of being formed out of the Officers of the great Departments—to consist of not less than five, nor more than seven Members, to be constituted and appointed by law; or by 2/3ds. of the Senate, with a duration & Rotation of Office, similar to that of the Senate.

The Objects of the National Government to be expressly defined, instead of indefinite powers, under an arbitrary Constructions of general Clauses.

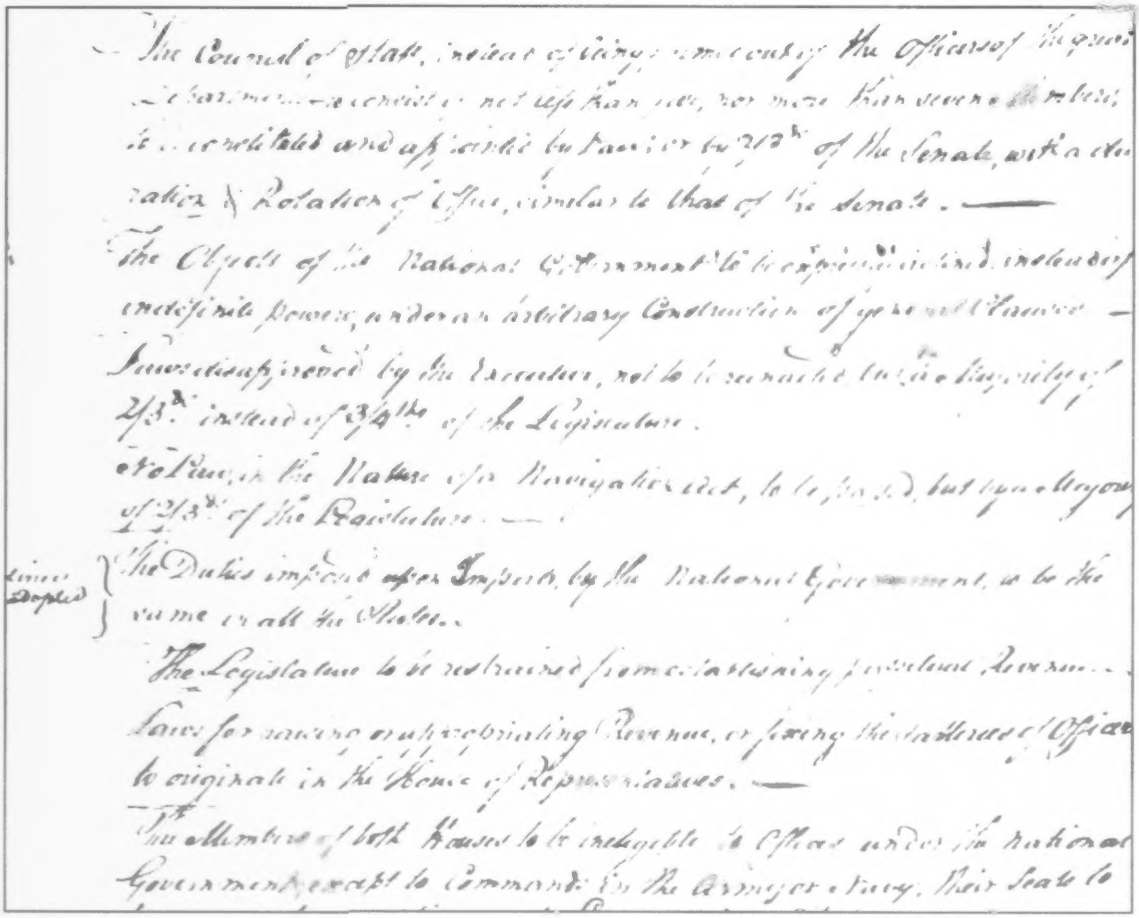
Laws disapproved by the Executive, not to be reinacted, but by a Majority of 2/3ds. instead of 3/4ths. of the Legislature.

The Duties imposed upon Imports, by since adopted} *the National Government, to be the same in all the States.*

The Legislature to be restrained from establishing perpetual Revenue.

Laws for raising or appropriating Revenue, or fixing the Salleries of Officers, to originate in the House of Representatives.

The Members of both Houses to be ineligible to Offices under the National Government; except to Commands in the Army or Navy; their seats to be vacated by accepting such Commands, and to be



Official journal of the Federal Convention for July 16, 1787. The work of William Jackson, this entry describes the Great Compromise. National Archives.

ineligible during their continuance.

The President of the united States to be ineligible a second Time.

The power of making Treaties, appointing Ambassadors &c. to be in the Senate, with the Concurrence of the Council of State—or vice versa.

The Appointment to all Offices, established by the Legislature, to be in the Executive, with the Concurrence of the Senate, or vice versa.

The power of granting pardons in the Executive not to extend to Impeachments, or to Treason—nor to preventing or staying process before Conviction & to be so expressly defined, as not, by any Construction to apply to persons convicted under the Laws & Authority of the Respective States.

The following is the Substance of a Clause, which was offered & miscarried in the Convention; it will come in very properly in the 5th. Section of the IV Article referred for reconsideration after the word except—*"Bills for raising Money for the purposes of Revenue, or for appropriating the same, or for fixing the Salleries of the Officers of Government, shall originate in the House of Representatives, & shall not be so altered or amended by the Senate as to encrease or diminish the Sum to be raised, or change the Mode of raising, or to Object of its' Appropriation."*

The documents printed here were selected to represent the wide variety of new materials found during the preparation of the supplement to Farrand's *Records*. Scores of letters written by Convention delegates to friends and family members, notes on Convention debates by John Dickinson and Pierce Butler, motions introduced at the Convention by James Wilson and Elbridge Gerry, and retrospective accounts of the Convention by William Samuel Johnson, Luther Martin, and Abraham Baldwin have been discovered and will be published. The result should be a better understanding of the Philadelphia Convention and the environment in which it was written.

James H. Hutson is the chief of the manuscripts division of the Library of Congress. He is the editor of the supplement to Max Farrand's *The Records of the Federal Convention of 1787*, published this year by Yale University Press.

The Achievement of the Framers

by HENRY STEELE COMMAGER

Professor Commager's essay is excerpted from a talk he gave as the keynote address for a conference entitled "Unus Ex Multis: *Maryland and the Ratification of the U.S. Constitution,*" *on June 25, 1986 at Washington College, Chestertown, Maryland. The conference was sponsored by Washington College and Celebrate Maryland, Inc.*

We now commemorate the two hundredth anniversary of the Constitution. That Constitution was the product, not alone of the debates in the federal convention of 1787, or even in the twelve long years of experience with a loose confederacy, but of that dazzling complex of science and philosophy familiar to us as the Enlightenment—an enlightenment which embraced the classical world of Greece and Rome as well as the new world of Leibnitz and Immanuel Kant, and which stretched from Newton to Napoleon in the Old World and from Roger Williams to Thomas Jefferson in the new.

Nowhere was the Enlightenment more pervasive or more effective than in America, effective both philosophically and practically. In the Old World its most prodigious achievements were in the discovery of the new worlds of nature and of man, in the sciences, philosophy, literature and the fine arts; such contributions as it made to economics, politics and social well-being had few consequences. But in America the Enlightenment, though it boasted its own galaxy of natural philosophers, found expression largely in the realms of politics, law, the economy and all those interests which were designed to enhance the general welfare. Franklin was its symbol: He not only "snatched the lightning from the skies, but the scepter from the hand of tyrants." If the proudest monuments to the Old World Enlightenment were such triumphs as Newton's *Principia* and Diderot's *Grand Encyclopaedia*, or the palace and the gardens of Versailles or Don Giovanni, the most enduring monuments to Enlightenment in America were the Constitution and the Bill of Rights, products of both philosophy and of common sense.

In a famous letter to the scientist-theologian Dr. Joseph Priestly, written just a few weeks after his own inauguration to the presidency, Jefferson put his finger on what was most remarkable about the experiment upon which the American people were embarked. "We can no longer say there is nothing new under the sun. This whole change in the history of man is new. The great extent of our Republic is new. Its sparse habitation is new. The mighty wave of public opinion which has rolled over it is new." He might have added that the choice of the foremost political philosopher by the vote of the majority of the plain people was new too. Where else in history had a people vindicated Plato's warning that "until philosophers are kings, the human race will never have rest from its evils." Well might Jefferson confess that his election—and in a hotly disputed contest—"augurs well for the duration of the republic."

Jefferson's observation on what was "new" merely touched the surface of the American scene. Never before in history had one generation presided over so prodigious a profusion of inventions and creation in the public arena.

Americans largely have taken this for granted: it was the English and French observers who saw it most clearly. Listen to the English born Tom Paine: "The American" he wrote, "is a new Adam in a new Paradise." He elaborated on this in his *Rights of Man*:

> *The case and circumstances of America present themselves as in the beginning of the world. We have no occasion to hazard ourselves upon conjecture. We are brought at once to the point of seeing government begin as if we had lived in the beginning of time.*

Or here is the Scots-born James Wilson, speaking in the Pennsylvania ratifying convention:

> *The science of government seems yet to be almost in a state of infancy. Governments in general have been the result of fraud, force or accident. After a period of 6000 years have elapsed since the Creation, the United States exhibit to the world the first instance of a nation unattacked by a foreign force, unconvulsed by domestic strife, assembling voluntarily on the system of government under which they wish their posterity to live.*

But perhaps it was John Adams, who said it best in a letter to Hezekian Niles a quarter-century later:

> *The colonies had grown up under circumstances of government so different there was so great a variety of religions, they were composed of so many different nations, their customs, manners and habits had so little resemblance, and their intercourse had been so rare and their knowledge of each other so imperfect, that to unite them in the same principles in theory and the same system of action was a very difficult enterprise. The complete accomplishment of it in so short a time and by such simple means was perhaps a singular example in the history of mankind. Thirteen clocks were made to strike together a perfection of mechanism which no artist had before effected.*

Today we take unity for granted—unity over that vast territory between Atlantic and Pacific, Canada and the Gulf of Mexico. But why do we? The United States had—and continues to have—a more heterogeneous population, more religious faiths, and—as far as nature went—more and more different natural environments than any nation of the old world or of Latin America. Why did the United States not go the way of Europe, of the vast continent to the South, or of Africa once its European masters had withdrawn? Certainly that is what most European observers foresaw: "In the general union of the providences" wrote the sagacious Turgot, "I do not see a coalition . . . making but one body. It is only an aggregation of parts always too much separated . . . by the diversity of their manners, their opinions, and still more by the inequality of its actual forces."

The notion that men could come together and create a nation was all but incomprehensible to the eighteenth century, and even as Americans were launching something new under the sun, ruthless masters of Prussia and of France were absorbing their weaker neighbors. What they did, again, was nothing new—imperialism could be traced back to Alexander and Caesar, and modern imperialism was less innovative than theirs. For new concepts of nationalism, for new philosophies, institutions, and mechanism, you had to look to the new United States.

How sobering to recall that in the thirty or forty years or so—from the 1770s to the first decade of the new century, a people with fewer than a million adult males, spread thin over an immense territory, with no city over forty thousand, no great centers of learning or culture, managed to create or in-vent every major constitutional institution which we boast today. Moreover, not one of comparable significance has been invented since that politically-mature population—roughly the size of Philadelphia's today—elected in one generation Washington, John Adams, Jefferson, Madison, Monroe and John Quincy Adams, who in turn chose for its Supreme Court three giants: John Jay, John Marshall, and Joseph Story.

Let me submit briefly that corpus of laws, institutions and inventions which we owe to the founding fathers, and on which we still rely.

First is the written constitution. That institution has some claim to be the oldest in our political history.

Second, the elementary but nevertheless revolutionary principle of democracy—I use that world in its original meaning of government by the people. As Jefferson wrote in the Declaration of Independence, governments derive "their just powers from the consent of the governed," and it is "the right of the people to alter or abolish it and to institute new governments." That concept would have been (and long remained) meaningless in any Old World country, but in the new world it was taken for granted.

A third historic contribution is the practical realization of federalism and the creation of the first effective federal union—and now the oldest. I shall return to this later.

A fourth invention is—again—so taken for granted it excites no interest and no comment: it is the formal end of colonialism, and the institution of the principle of the co-ordinate state. Because Americans revolted against a colonial status, they were not prepared to condemn any part of their own territory to colonialism. The framers' decision was political—and even moral—an historic promise that the American empire was not to be a replica of Old World empires, but something new under the sun, a commonwealth based on the equality of co-ordinate states. That principle was written into the famous Northwest Ordinance of 1787 and has survived to this day.

A fifth contribution—perhaps it cannot be called an invention for there were abundant anticipations, if not antecedents—was the creation of effective limits on government. Americans, to be sure, had never really known a government with unlimited power (for they managed to evade or confound such legislation as they disapproved, and to bribe or intimate royal governors) but it could be said that Europeans had never really known one that was limited.

The framers did not include a Bill of Rights in the Constitution of 1787. Their reasons were logical, if not sound: that as the new government had only those powers granted to it, and as no power to infringe on the liberties of men was granted, a bill of rights was superfluous. But the people did not reason that way, and they had the support of Jefferson over in Paris, who saw Hamilton's logic as too abstract for popular consumption. Said Jefferson: "A bill of rights is what the people are entitled to against every government on earth and what no just government should refuse or rest on inference."

Madison responded to that demand by drawing up, and steering through the Congress, the Bill of Rights which has ever since been regarded as an integral part of the Constitution itself. Nor were liberties limited to those specified. For the Bill contained another amendment: the Ninth, long, and still, neglected, but with unexplored potential. That "Forgotten" amendment reads quite simply: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The door, in short, is still wide open for the recognition of other rights not specified in the Bill of Rights itself.

It early became clear that the implementation of the guarantees in the Bill of Rights was the proper function of the judiciary. That was the principle later incorporated into American constitutional law by Justices Marshall and Story. There are murmurs, and even outcries, against it, but it has stood the test of time. We take that pretty much for granted, but nothing comparable to judicial review is to be found elsewhere. The practice is all the more remarkable when we recall that though democracy assumes majority rule, judges who hold office for life can veto the decisions of the two popularly elected branches, i.e. the majority. In theory this limitation on popular rule appears paradoxical. If so, it is merely one of the paradoxes of the role of the American judiciary in our federal system.

Another paradox is that a people with a long tradition of lawlessness and revolution embraced a government founded on law, and that a people irreverent to the authority of a king or a church revere a court above all other secular institutions. "Where is the king of America?" Tom Paine asked, and answered: "In America the law is king."

Judicial review is merely the most ostentatious of the limits on the legislature. There are a score of other checks and balances and limitations. It must suffice to list some of them: the tri-partite division of governments; the bicameral legislature; the executive veto; and the power of the legislature to override that veto; staggered, but frequent elections ("where annual elections end, there tyranny begins" said Sam Adams); and, as a further safeguard, short terms, limitations on consecutive terms, and—in the past, at least—low pay. To these we might add (both in the states and the nation) provisions for constitutional amendments or for new constitutions, i.e., provision for legal revolution!

All this was a verification, as it were, of that observation by the sagacious John Dickinson of Pennsylvania:

> *For who are a free people? Not those over whom government is reasonably and equitably exercised but those who live under a government so constitutionally checked and controlled that proper provision is made against it being otherwise exercised.*

I deal briefly with three revolutionary contributions to the science and the practice of government by a generation of the founding fathers. All three are of significance not only to America but to the modern world. The first of these is the effective separation of church and state: freedom of religion. That principle, which had its roots deep in our own history, has spread widely throughout the civilized world. But it is not yet universally accepted. Religious wars flourish and religious freedom is rejected in many parts of the globe today: Catholics and Protestants fight in Northern Ireland; Moslems and Jews in the Near East; Hindus and Moslems in India and Pakistan; Christians and Moslems in the Philippines. But the United States has never had a religious war, nor persistent religious persecution. That good fortune owes much to an early admixture of religious groups which implacably imposed religious toleration on Americans: there were some 16 religious denominations in colonial New York City alone. It owes much to the good fortune of vast territory: religious dissenters—like Mormons—could find refuge (if it were needed) in vacant land. It owes much to the total inability of Britain to impose its Established religion, the Anglican, on its American colonies. On the eve of the Revolution, the Anglican Church was the Established religion in North Carolina but there were only two Anglican churchmen to minister to the whole of that vast territory! But it owes much, too, to the far-sighted vision of men and women like Roger Williams and Anne Hutchinson who established the tradition of toleration in New England, and much to later statesmen like Jefferson whose Virginia Statute for Religious Liberty of 1786 excited greater astonishment in Europe, and greater misgivings, than had either the Declaration of Independence or the Constitution itself.

The second of these is the supremacy—John Adams wrote "an exact" supremacy—of the civil to the military authority.

Washington was loyal to that principle throughout the Revolution, referring to the Congress for any initiative and disdaining the attempt to betray him into seizing command. His Newburgh Address is now part of the American heritage. "You will," he said to his officers,

> *give one more distinguished proof of unexampled patriotism and patient virtue, risking superior to the pressure of the most complicated sufferings. And you will by the dignity of your conduct afford occasion for posterity to say, when speaking of the glorious example you have exhibited to mankind, had this day been wanting, the world had never seen the last stage of perfection to which human nature is capable of attaining.*

That tradition was not only reaffirmed, but married to far-sighted statesmanship, when Lincoln wiped the slate clean, as it were, by rejecting any punishment of any kind for treason through the use of the pardoning power.

The third unprecedented contribution is the modern political party, something really new under the sun of politics—a party which grew from the bottom up, not the top down as in England; which was national, not local or regional; and which found its leaders in the common people, not in those who exploited hereditary claims to leadership, as persisted in the Old World into the nineteenth century. There was from the beginning, too, a special merit in the political party as it emerged in America: it avoided (for the most part) those ideologies which afflicted and still afflict politics in the Old World and addressed itself to practical issues which concerned the mass of people. The single time parties broke apart on ideological grounds—1854 to 1860—the Union, too, broke apart.

I turn finally to what has some claim to consideration as the most successful and enduring contribution of the Constitutional Convention. If Madison is conceded to be the "Father of the Constitution," Benjamin Franklin is the father of Federalism. As early as 1754, on the eve of the Seven Years' War, he had tried to encourage cooperation between colonies and mother country by drawing up the Albany Plan of Union, a plan which anticipated in many of its features the federalism worked out in 1787. Again, at the opening of the second Continental Congress, Franklin came forward with an elaborate draft of what approached the finished Constitution of 1787. During much of the War Franklin was off in Paris; back home by 'eighty-five, he was chosen president of Pennsylvania, and then became its first choice as delegate to the Constitutional Convention. There, like Washington, he was a symbol rather than an active participant. Though Washington said scarcely a word during the debates, and Franklin spoke only rarely, it may be said that these two men were the most influential members of that "assemblage of demigods" merely by their presence.

There is no more difficult problem in the whole of politics than that of contriving a viable federal system. Federalism is not only the basic institution of American constitutionalism. It is also the most complex, the most controversial, and perhaps the most vulnerable.

There were, in fact, three American experiments in federalism. Two of them failed—The Confederation of 1783, whose inadequacy was speedily remedied by the Federal Convention of 1787, and the Confederate States of America, created in 1861, and modelled closely on that of the United States except in one crucially important matter: it asserted and guaranteed the sovereignty of the states! States' rights, which broke up the Union, killed the Confederacy, but the Union survived and was triumphantly reconstructed.

Why did the Federal Union of 1787 survive when others failed?

There are four essential ingredients to effective federalism; all rise to the dignity of principles. First is a recognition that the source of all political authority is in the people and that it is the duty and the right of the people to distribute that authority among governments as they choose. Second is a realistic distribution of powers, with those of a general or national character assigned to the central government, and those of a local nature to state or local governments, while those that are common to both, such as the power to tax or to provide justice, are left to both. A third essential is that the division between national and state or local authority must rest on some legal distinction and be indicated in broad but flexible terms, adapted to the exigencies of an ever-changing society and economy. A fourth is the establishment of some formal mechanism or institution for clarifying and endorsing a proper distribution of the exercise of national and local powers. This, in turn, called for what proved to be one of the most remarkable of modern political contrivances: dual citizenship—a notion taken for granted in the original Constitution and formalized in the opening words of the Fourteenth Amendment: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

But, as the Constitution left the hands of its framers and of the framers of the Bill of Rights, there was one omission which, with the passing years, took on a threatening character: that was the assurance that all persons in the nation would be assured of equal rights. That omission was inevitable, to be sure in the circumstances of the 1790s; it took the Civil War to repair it. It was settled in 1865 by the verdict of Appomattox, and in 1868 by the Fourteenth Amendment to the Constitution. The Amendment provided, in words which have proved to be the most important in the history of liberty and equality, that

> *No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

That settled the principle constitutionally, to be sure, but not yet politically, practically, or socially.

President Reagan asserted in his Inaugural Address that "the nation did not make the states, the states made the nation." It is a conclusion that might well astonish citizens of all states west of Pennsylvania, for all of these (except perhaps Texas which annexed the United States) were created by Congress, governed by Congress in their territorial stage, and admitted to the Union by presidential approval after the Congress passed on their credentials! But that misunderstanding is trivial compared to a deeper misunderstanding, one which misreads both history and law. In our constitutional system it is "We the people" who made and still make both nation and states, each forming part of the "more perfect union."

The national federalism of Washington and Madison, Hamilton and John Marshall, was not a method of destroying local self-government, it was a product of the war for independence and of the struggle for national survival. Its character was best described by John Marshall (himself an ardent supporter of the new Constitution in the Virginia ratifying convention) in a decision which challenged his own state of Virginia:

> *In war we are one people, in all commercial regulations we are one and the same people. . . . The government which alone is capable of controlling and managing their interests in all respects is the government of the Union. America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete: to all these objects, it is competent. (**The Cohens** v. **Virginia**, 1821)*

The Bicentennial of the Constitution should inspire us with a renewed respect for its character and its principles. Our experience with nullification in South Carolina, with the Civil War and its aftermath, with great depressions like those of 1873, 1893, and the 1930s, with two great World Wars, dramatizes the primary role of the national government in preserving the harmony of the Union and the necessity of national authority to achieve the purposes set forth in the preamble, particularly justice and the general welfare.

Justice Story concluded his classic *Commentaries on the Constitution* (1833) with a tribute to the nation at once logical and eloquent, and a verdict which is as valid today as it was 150 years ago:

> *No man will pretend to say that the affection for the state governments has been sensibly diminished by the operation of the general government. If the latter has become more deeply an object of regard and reverence, of attachment and pride, it is because it is the parental guardian of our public and private rights, and the natural ally of all the state governments in the administration of justice and the promotion of the general prosperity. It is beloved not for its power, but for its beneficence; not because it controls but because it sustains the common interests and the common liberties and the common rights of the people.* ***(Commentaries****:515)*

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"Outcast" Rhode Island—The Absent State

by JOHN P. KAMINSKI

"Twelve states sent delegates; Rhode Island did not attend." This statement has been and will be repeated over and over again as we celebrate the Bicentennial of the United States Constitution. By now it has become a well-known fact that only Rhode Island refused to appoint delegates to the Constitutional Convention that met in Philadelphia during the summer of 1787. But few know why Rhode Island remained aloof.

The fundamental cause of Rhode Island's behavior lay in economics. As in other states, Rhode Island's economy had been thrown into turmoil by the Revolutionary War. Postwar depression in Rhode Island had caused the state to polarize politically and in April 1786, the Mercantile Party, which favored strengthening Congress' powers, was thoroughly repudiated at the polls. The Country Party, which promised a program of debtor relief, won overwhelming victories in both the legislative and gubernatorial elections.

In May 1786 the Country Party began implementing its antidepression program, which centered around the issuance of £100,000 in paper money to be loaned by the state primarily on real estate collateral. The enormous amount of money issued, suspicion of paper money brought about by bad wartime experience with continental currency, and the requirement that creditors accept the paper in payment combined to guarantee that the currency would decline in value. In fact, depreciation was exactly what Country Party leaders wanted. With a depreciated currency, debtors—both public and private—could more easily pay their obligations, contracted originally in more valuable currency like gold or silver. One dollar in gold in 1786 would buy several times more than one dollar in paper, but as legal tender the paper would be equal to gold in paying off old debts. The state thus would be able easily to pay its huge public debt, which had gravitated into the hands of a relatively few merchant-speculators. These few had been reaping large profits from interest paid by the state at the expense of farmers impoverished by the taxes levied to meet these obligations. Farm bankruptcies and foreclosures became common. The short-term goal of the Country Party was "To Relieve The Distressed." A long-term goal was to redeem the entire state debt with almost worthless paper money. This redemption began in December 1786 and was completed less than three years later.

By early 1787, the Country Party's program was well established and a large majority of Rhode Islanders expressed approval at the spring elections. A vociferous minority, however, denounced the paper-money program. Nationally, Rhode Island's policies gained notoriety and a wave of verbal abuse assaulted the state. Newspapers in particular were filled with denunciations of "Rogue's Island." Some even demanded the abolition of the state as a political entity, proposing to divide its territory between Connecticut and Massachusetts. The more Rhode Island was censured, the more Rhode Islanders as a whole supported the Country Party and derided the interfering Congress.

The desire to give Congress power to control the radical economic policies of some of the states served as a central reason for calling the Constitutional Convention. Rhode Island's radicalism stood out above all others. Congress itself had denounced Rhode Island's paper money in 1786 when it refused to accept the currency in payment of the congressional requisition. Many Americans agreed with George Washington's description of Rhode Island as "outcasts from the Society." Thus, Rhode Islanders knew that the Constitutional Convention was aimed, in part, at them. On the other hand, as long as the Articles of Confederation remained in operation, Country Party leaders knew that their economic program would be immune from congressional interference. The unanimity required of the states to amend the Articles or to grant additional powers to Congress meant that Rhode Island could exercise a veto over any proposed change.

On 14 March 1787, the Rhode Island Assembly met and read the congressional resolution of 21 February calling the Constitutional Convention. A motion to appoint delegates to the Convention was rejected by a substantial majority of those present. During the first week of May 1787 another legislative session convened and assemblymen from Providence and Newport urged a reconsideration of an appointment to the Convention. The Assembly approved the appointment by a majority of two, but the Upper House voted it down by a two-to-one majority.

In response to this second rejection, twelve merchants and tradesmen from Providence who opposed the state's economic program took matters into their own hands. With General James M. Varnum, a Rhode Island delegate to Congress, as emissary, they sent a letter to the Constitutional Convention that expressed their distress at Rhode Island's decision: "Deeply affected with the evils of the present unhappy times," the merchants wrote, they thought it proper to tell the Convention of the hope "of the well inform'd throughout this State" that Congress might be given additional powers over commerce and taxation. The group asked that the Convention allow Varnum "to take a seat with them; when the Commercial Affairs of the Nation are discuss'd." On 28 May the Constitutional Convention read the letter but refused the request.

In mid-June, the Rhode Island Assembly again turned down a proposal to send delegates to Philadelphia. In this instance, the Upper House voted "yea" and the Assembly "nay." But the apparent reversal was owing to some political chicanery. The Country Party, in control of both houses of the legislature by sizable majorities, decided that it was politically opportune for its members in both houses to be able to say to some of their constituents that they had supported sending delegates to the Convention, but to be able to say to other constituents that they had opposed the appointment of delegates. The apparent flip-flop by the houses was in reality a well-orchestrated move that allowed Country Party legislators to be on both sides of this issue.

Two days after the last rejection, General Varnum wrote to George Washington, president of the Constitutional Convention, fuming. Varnum wanted Washington to know "that the measures of our present Legislature do not exhibit the real character of the State. They are equally reprobated & abhor'd by Gentlemen of the learned professions, by the whole mercantile body, & by most of the respectable farmers and mechanicks. The majority of the administration is composed of a licentious number of men, destitute of education, and many of them void of principle. From anarchy and confusion they derive their temporary consequences, and this they endeavor to prolong by debauching the minds of the common people, whose attention is wholly directed to the Abolition of debts both public & private."

All over the country, people decried Rhode Island's action. On 2 September Francis Dana, a Massachusetts delegate to the Constitutional Convention who was unable to attend because of illness, wrote his fellow Convention delegate Elbridge Gerry that Rhode Island's "neglect will give grounds to strike it out of the Union & divide [its] Territory between [its] Neighbours. . . . Therefore a bold politician wou'd seize upon the occasion [of its] abominations and anti-federal conduct presents for annihilating [it] as a separate Member of the Union. I think they are now fully ripe for the measure, and that the other Members of the Union, nay all Mankind, must justify it as righteous & necessary."

In response to the widespread disapproval, Governor John Collins called the legislature into special session in mid-September 1787. A joint legislative committee was appointed to draft a letter to Congress explaining why the legislature had refused to appoint delegates to the Convention. The letter, adopted on 15 September, acknowledged the "many severe and unjust sarcasmes propagated against us" for failing to appoint Convention delegates, but it asserted that the legislature could not appoint such a delegation because a state law provided that only the people could elect delegates to Congress. A legislative appointment to the Convention which intended to propose amendments to the Articles of Confederation was felt to be a violation of the spirit of this law. (The Committee did not explain the discrepancy between this position and the fact that each house of the legislature on different occasions had believed that it was proper to appoint delegates to the Constitutional Convention.) Nevertheless, the legislature, it said, looked forward to joining "with our Sister States in being instrumental in what ever may be advantageous to the Union, and to add strength and permanance thereto, upon Constitutional principles." The Assembly deputies from Newport and Providence entered an official protest to this letter stating that "the Legislature have at various times agreed to Conventions with the Sister States," and the appointment of delegates to these conventions had never been considered "inconsistent with or any Innovation upon the Rights and Liberties of the Citizens of this State." On 17 September Governor Collins forwarded both the letter and the protest to Congress where they were read a week later.

Why then did Rhode Island oppose the Constitutional Convention? First and foremost, Rhode Islanders believed that the Convention would take some decided action against the radical economic policies of the state legislatures. Country Party leaders, unused to federal involvement, did not want to participate in such an inhospitable assembly. Their primary goal was to redeem the state debt with depreciated state currency; little else mattered. Their aloofness, they hoped, might even lessen the authority of the Convention by denying it an unanimous representation of the states. Country Party leaders worried little about the actual implementation of anti-Rhode Island measures. They saw no need to fight these anticipated discriminatory measures in the hostile arena of the Convention when Rhode Island knew that it could veto any change in the Articles of Confederation proposed by the Convention.

But the strategy backfired. Rhode Island's failure to appoint delegates to the Constitutional Convention proved advantageous to advocates of a new constitution. The obstinacy of Rhode Island demonstrated clearly that the newly-proposed Constitution could not be ratified by all of the states as required by the Articles of Confederation. Rhode Island's absence thus helped persuade the Constitutional Convention to provide that ratification by nine states would be sufficient to establish the Constitution among the ratifying states.

Rhode Island's obstreperousness continued. Its legislature refused on seven occasions to call a state convention to consider the Constitution. Not until January 1790, after all of the state debt had been redeemed, was a ratifying convention called. The Convention met during the first week of March 1790 and proposed a bill of rights and amendments to the Constitution that were submitted to the people for their consideration in town meetings. The Convention then recessed until late May.

The continued failure of Rhode Island to ratify the Constitution exasperated Congress. On 13 May 1790 the United States Senate passed a bill to boycott the wayward state. No American ship could enter Rhode Island, and no Rhode Island ship could enter the United States. The bill also prohibited land transportation and provided that the recalcitrant state pay Congress $25,000 by December 1790 in payment of Rhode Island's share of the expenses of the old Confederation government.

Now under seige from Congress, Rhode Islanders began to press for ratification. On 24 May 1790, the day that the state Convention reconvened, a Providence town meeting instructed its Convention delegates on their course of action should the Constitution be rejected again. The delegates were ordered to confer with delegates from Newport and other towns in applying to Congress for protection if and when the towns seceded from the state. Rhode Island had had enough—it could no longer stay out of the Union. On the 29th of May 1790 the Convention voted 34 to 32 to ratify the Constitution. The fourteen-month separation was over—Rhode Island was again one of the United States.

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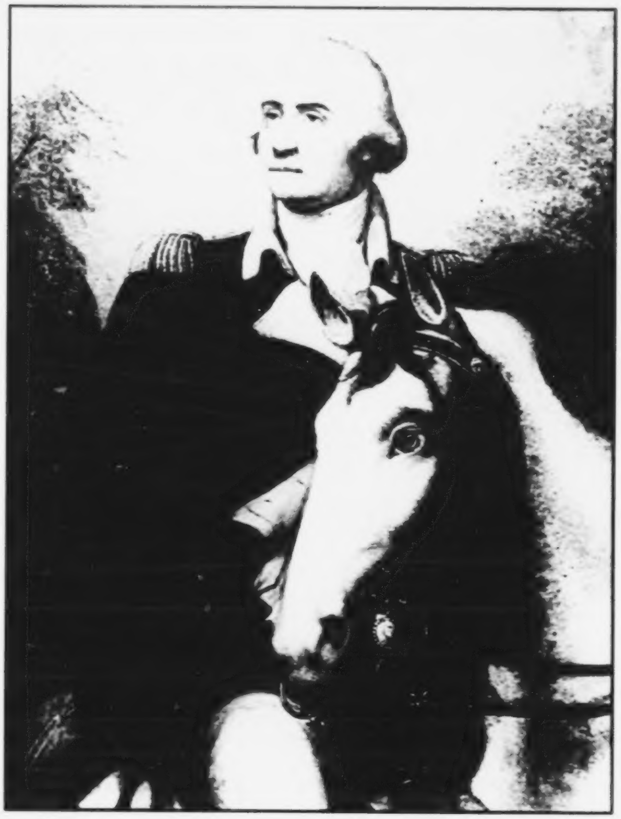
Who Was Who in the Constitutional Convention: A Pictorial Essay of Its Leading Figures

by MARGARET HORSNELL

It all began on May 25, 1787, a rainy Friday morning, as the delegates assembled at the State House in Philadelphia where eleven years earlier the Declaration of Independence had been voted and signed. Now these delegates were about to participate in another event of major significance: the Constitutional Convention.

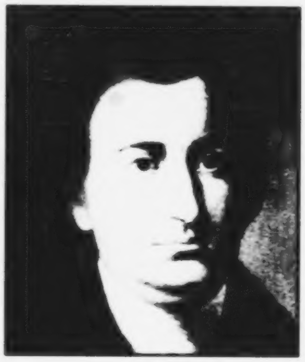
Of the seventy-four delegates who were selected to attend the Convention, only fifty-five eventually participated and, of those, only thirty-nine signed the completed document. The following are paintings and engravings, made around the time of the Convention, of eleven of the men who played key roles in shaping and presenting plans of government, and in hammering out compromises that were crucial to the successful completion of that extraordinary document.



George Washington
Portrait: Rembrandt Peale
Courtesy of Independence National Historical Park
Philadelphia, PA

As the first order of business, George Washington was unanimously elected as the presiding officer. He was fifty-five years old, a striking figure—over six feet tall—elegant, energetic, and graceful. Among the delegates as well as among most Americans, Washington had won an unparalleled reputation by his service as the commander of the Continental Armies. Washington spoke only once during the Convention and then on a very minor issue. His most important function at the Convention was to serve as a symbol of probity and legitimacy. William Pierce, a fellow delegate who wrote brief biographical sketches of all the members of the Convention, observed of Washington, "Having conducted these states to independence and peace, he now appears to assist in framing a Government to make the People happy."

Edmund Randolph
Portrait: Flavius J. Fisher
Courtesy of Virginia State Library, Richmond, VA



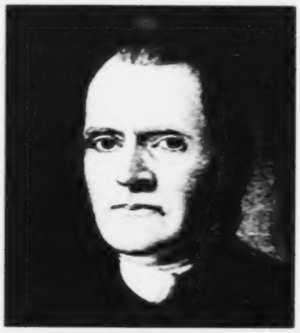
The first serious debate of the Convention was initiated when Edmund Randolph introduced the Virginia Plan. Randolph, a member of one of the first families of Virginia, only in his early thirties, had already been elected Governor of Virginia. The introduction of the Virginia Plan changed the course of the Convention because, rather than revising the Articles of Confederation as the delegates had been instructed, the delegates now began to debate the merits of new a scheme of government.

Although Randolph played an active role in the Convention's deliberations, he refused to sign the completed document alleging that he was concerned about the "indefinite and dangerous powers given to Congress." These reservations were apparently overcome after the Constitution was ratified because Randolph accepted the position of Attorney General in Washington's first cabinet.

Roger Sherman
Portrait: Thomas Hicks after Ralph Earl
Courtesy of Independence National Historical Park
Philadelphia, PA

Roger Sherman, delegate from Connecticut, was one of the pivotal figures in the Constitutional Convention. Sherman introduced a compromise which reconciled the Virginia and the New Jersey plans. A typical product of Yankee New England, Sherman was hard working and honest, an astute self-educated lawyer. Although he came from modest circumstances, he had worked his way up the social ladder. In general he thought the government under the Articles of Confederation satisfactory; yet he also realized that it needed adjustments to remedy specific defects. William Pierce described Sherman as "awkward . . . and unaccountably strange in his manner. But in his train of thinking there is something regular, deep, and comprehensive."

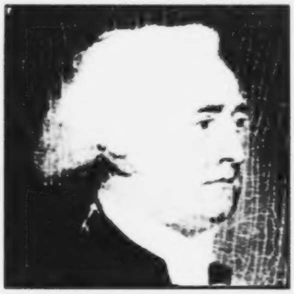
To Sherman, politics was the art of compromise. Therefore, not surprisingly, he introduced the Great Compro-



mise that would break the deadlock the Convention had been struggling with for more than six weeks. The controversy centered on the question of whether representation was to be based on population or whether each state was to be equally represented. Sherman's solution was one he had brought up eleven years earlier during the debate on the Articles of Confederation, namely that representation should be based on two different principles. The lower house should be apportioned according to population and in the upper house the states would be equally represented. This compromise was accepted by the delegates on July 16.

John Rutledge

Portrait: John Trumbull
Courtesy of Yale University
Art Gallery, New Haven, CT



Planter, lawyer, businessman, head of the aristocratic South Carolina delegation, John Rutledge served with particular skill as the Chairman of the Committee of Detail. That Committee pieced together, from various motions which had come before the Convention, the first draft of what was to become the Constitution. In the process, the Committee converted the general law-making power of Congress into eighteen specific powers beginning with the power to tax and ending with the "Necessary and Proper" clause.

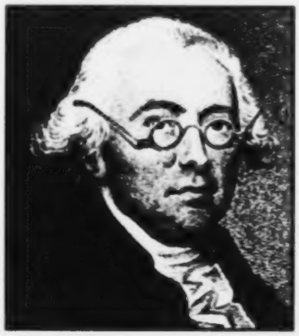
The Committee also placed a number of restrictions on the power the states might exercise. By granting some power to the national government and withholding some power from the state governments, the Committee had come up with a partial solution of how to divide sovereignty between the states and the national government, thereby laying the foundations for the federal system.

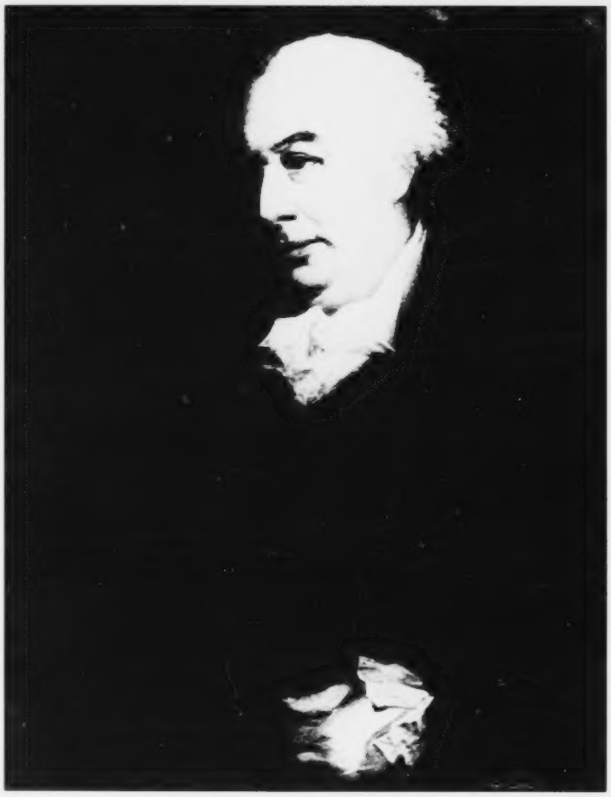
James Wilson

Portrait: Society Portrait
Collection
Courtesy of The Historical
Society of Pennsylvania
Philadelphia, PA

James Wilson was one of the most influential members of the Pennsylvania delegation. Along with James Madison, Wilson was probably the most sophisticated political thinker at the Convention. Pierce said of him "Mr. Wilson ranks among the foremost in legal and political knowledge."

As the debate on representation in the legislative body developed, the question of how slaves were to fit into the new scheme of government came up. At this point Wilson proposed that apportionment in the lower legislative body should also include three-fifths of all other persons—namely slaves. The question of whether slaves should be counted as people for the purposes of representation was not new. The three-fifths formula had been recommended by the Congress under the Articles of Confederation in 1783 and had become known as the "federal ratio." Apparently Wilson believed that the three-fifths compromise on slavery was the price that had to be paid for the support of the Deep South for popular representation in the legislative bodies. At any rate, the three-fifths compromise on slavery set the stage for the Great Compromise.





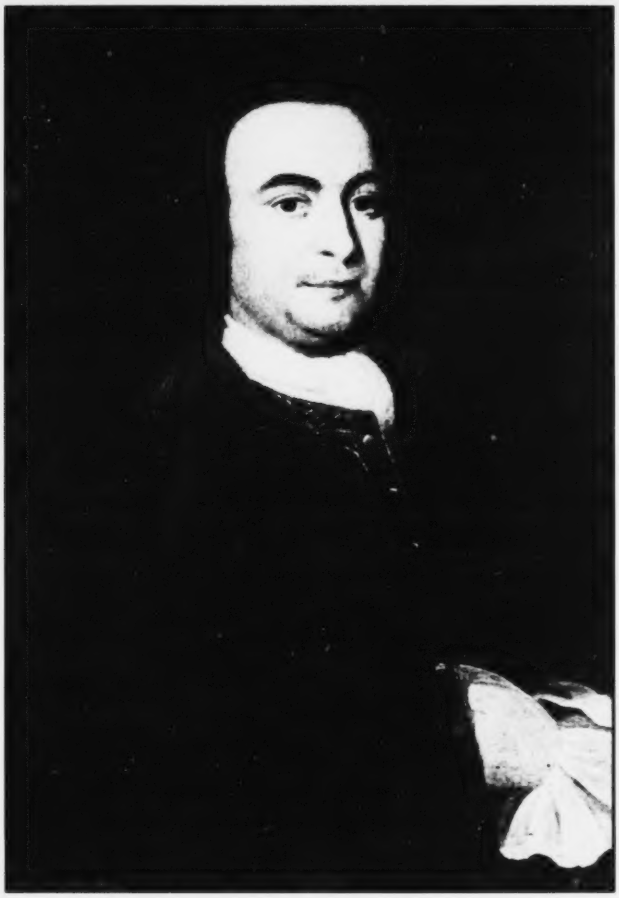
Gouverneur Morris

Portrait: Thomas Sully
Courtesy of The Historical
Society of Pennsylvania
Philadelphia, PA

Governeur Morris spoke more than any other delegate at the Convention. He was witty, sophisticated, an aristocrat to the core. Morris had little faith in the common man and therefore favored property qualifications on suffrage. Pierce says of him that he was "one of those Genius's in whom every species of talents combine to render him conspicuous and flourishing in public debate, [yet] with all those powers he is fickle and inconstant, never pursuing one train of thinking."

As a member of the Committee of Style, it was Morris who put the finishing touches on the Constitution. Perhaps his most important contribution in this area appears in the Preamble. The original Preamble, written by the Committee of Detail, after the phrase, "We the People," listed each of the states; Morris changed the language by deleting the states' names and substituting "United States." The Preamble would thus begin: "We the People of the United States." Given Morris' conservative predilections, it is unlikely that this change in phrasing was motivated by a desire to increase popular participation in the new frame of government; it may however have been introduced as a means of legitimizing the activities of the Convention. The opponents of the Constitution could not claim that the new government was based upon "aristocratic" principles if the authority to originate that government rested with the people. Whether it was intentional or not, by this fortuitous shift of phrase another step was taken in transferring the sovereign power from the states to the people.

By Monday, September 17, 1787, the delegates at the Convention had completed their work, and Madison made this closing entry in his Journal: "The Constitution being signed by all the Members except Mr. Randolph, Mr. Mason, and Mr. Gerry who declined giving it the sanction of their names, the Convention dissolved itself by an Adjournment sine die——."



George Mason

Portrait: D. W. Boudet (after a lost painting by John Hesselius)
Courtesy of Virginia Museum, Richmond, VA

Ranked with Washington and Jefferson, George Mason was an immensely influential political figure in the state of Virginia. A wealthy planter-aristocrat and slave owner, he opposed the extension of slavery. He wrote the famous Virginia Declaration of Rights which was an eloquent statement of human freedom and which, after the Constitution was ratified, served as a basis for the Bill of Rights. Pierce described Mason as "a Gentleman of remarkable strong powers, [who] possesses a clear and copious understanding."

During the Convention, he actively supported the provisions of the Constitution prohibiting the suspension of the right of habeas corpus by Congress, prohibiting the use of bills of attainder (legislation that punishes an individual without trial or conviction in ordinary judicial proceedings), and prohibiting the use of ex post facto laws. On September 12, Mason suggested that a general bill of rights be added to the Constitution. He observed that "it would give great quiet to the people." Elbridge Gerry, a delegate from Massachusetts, concurred. However, Roger Sherman spoke against the bill of rights on the grounds that it was unnecessary because the state governments had declarations of rights which were not repealed by the Constitution. The Convention voted down the addition of a bill of rights.

The failure of the Convention to provide any basic list of guaranteed rights and the extension of the slave trade for twenty years turned Mason against the Constitution and he refused to sign the document. Later in the Virginia Ratifying Convention, Mason became one of the principal spokesmen opposing the acceptance of the document.

Luther Martin

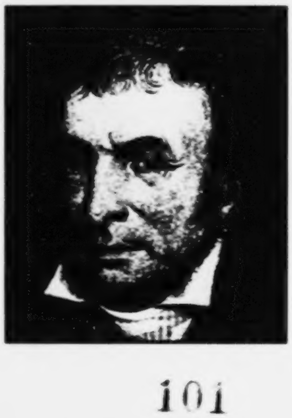
(No artist listed)
Courtesy of Museum and Library of Maryland History Baltimore, MD

Ornery and brilliant, Luther Martin was one of the most fascinating personalities at the Convention. An unyielding advocate of the rights of the states, Martin confounded the delegates by providing the original language for the Supremacy Clause. Born in the backcountry of New Jersey, Martin was from modest circumstances. Blessed with an outstanding mind, he made his way to Princeton where he became one of the top scholars in his class. At the Convention Martin spoke frequently, and to many delegates tiresomely, on the issue of states' rights. For Martin, the states were sovereign entities. The states and not the people were the basic building blocks within the political system. Since each of the states was an equal independent unit, any plan to diminish the equality of the states was anathema to Martin.

Perhaps his most important contribution was made on July 17. At that time the delegates were discussing how disputes between the national and the state governments were to be resolved. Martin, a fervent advocate of states' rights, made the following astonishing motion: "that the acts of Congress and treaties shall be the supreme law of the respective states . . . and the judiciaries of the several states shall be bound thereby in their decisions. . . ."

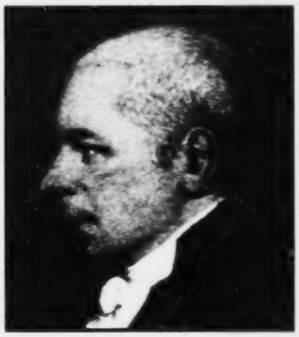
The language of this motion was subsequently modified and eventually this provision became known as the "Supremacy" clause. Although this clause appeared to grant additional power to the national government, the question of what agency of government would overturn state laws that conflicted with national laws was left unresolved. Martin pointed out that at the time he made this motion it was not established that there would be an inferior national court system; therefore he assumed that the state courts would settle any disputes that might arise.

On September 4, Martin left the Convention in disgust. He refused to sign the document declaring that the Constitution would create a consolidated "kingly government."



William Paterson

(No artist given)
Courtesy of Midlantic National Bank/North, West Paterson, NJ

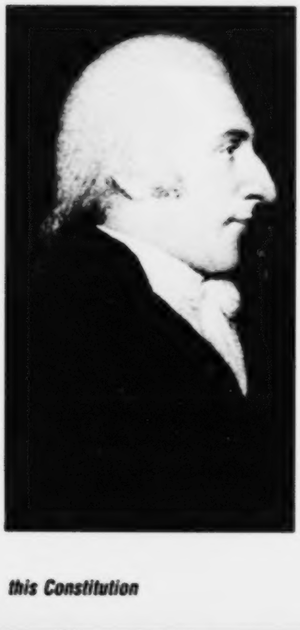


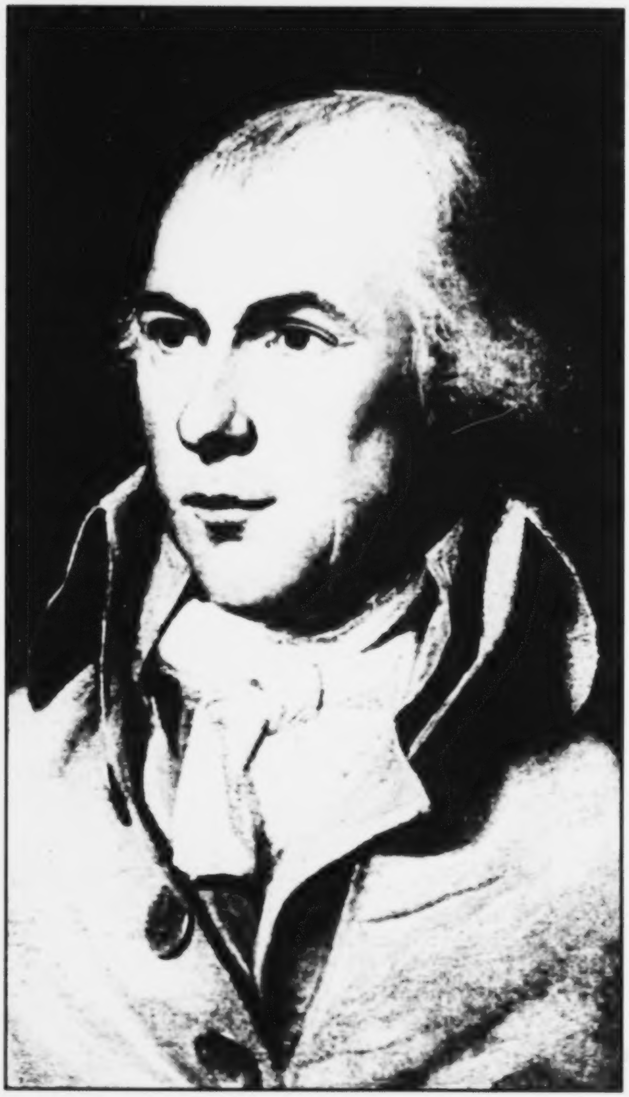
On June 15, William Paterson introduced the New Jersey Plan—which was the small states' response to the Virginia Plan. Paterson, delegate from New Jersey, was educated at Princeton and trained as a lawyer. He had a profound respect for property rights. Paterson believed that freedom could flourish only in a stable economic environment. Like other moderate nationalists, Paterson realized that it was necessary to increase the power of the central government; yet he also wished to protect the rights of the states. William Pierce characterized him as "one of those kind of men whose powers break in upon you, and create wonder and astonishment."

William Samuel Johnson
Portrait: Albert Rosenthal after Gilbert Stuart
Courtesy of Independence National Historical Park Philadelphia, PA

Sophisticated, dignified, William Samuel Johnson was from one of the most socially prominent and wealthy families of Connecticut. Throughout the Convention, Johnson had been an active behind-the-scenes participant. As the Convention wound to an end, Johnson offered a proposal which squarely raised for the first time the issue of the jurisdiction of the Supreme Court.

The question of judicial review—the right of the Supreme Court to overturn laws that are not constitutional—was never really resolved during the Convention. The closest the delegates came to deciding the issue occurred during a debate on the organization of the Court. At that time, Johnson offered an amendment which stated that "the jurisdiction of the Supreme Court shall extend to all cases arising under this Constitution and the laws passed by the Congress of the United States." According to Madison, the delegates accepted this provision with the understanding that the jurisdiction of the Supreme Court extended to only those cases involving the judiciary and not to cases involving the President or the Congress.





James Madison
Portrait: Charles Willson Peale
Courtesy of Thomas Gilcrease Institute of American History and Art, Tulsa, OK

At the Convention, the modest but gifted James Madison played dual roles: as the reporter of the proceedings and as one of the principal authors of the document. Because the delegates took an oath of secrecy, there were no official records of the debates of one of the most important events of American history. William Jackson, the official secretary, seems to have kept only a simple record of motions and votes. But James Madison became the Convention's most assiduous chronicler. Madison attended all of the meetings and positioned himself in front of Washington so that he could more easily follow the proceedings. As a result of his prodigious labors, Madison's "notes" have become the principal source of information of these extraordinary and secret meetings.

Not only did Madison record what happened but he shaped the substantive issues of the Convention. Madison enthusiastically supported a strong national government and the abandonment of the Articles of Confederation. It was his philosophy of government, embodied in the Virginia Plan, which set the tone for the Convention. Pierce said of him, "Every person seems to acknowledge his greatness. He blends together the profound politician, with the scholar."

Margaret Horsnell is a professor of history at American International College in Springfield, Massachusetts.

A Brief Reading List about the Creation of the Constitution

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Catherine Drinker Bowen, *Miracle at Philadelphia* (1966).
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John Hope Franklin, *From Slavery to Freedom* (1979).
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A Daybook for 1787

Philadelphia

July 9, 1787 to July 13, 1787

The following pages are excerpted from A Daybook for 1787, *a collection of essays by the historians at Independence National Historical Park. The complete two-volume work, which covers the entire year, is available either in book form or on floppy disks. For further information, write to Independence National Historical Park, Attn: Eastern National Park and Monument Association, 313 Walnut Street, Philadelphia, PA 19106; telephone: (215) 597-2569.*

Philadelphia

Monday, July 9, 1787

PHILADELPHIA TODAY

After a night of heavy thunder but little rain, the day dawned sunny and hot (mean of 81° at Springmill). Tobacco, snuff, chocolate, mustard, and the best pickled sturgeon were some of the items advertised on the front page of the *Pennsylvania Gazette* during the week. Despite a post Revolutionary War depression, Philadelphia remained a thriving center of commerce where the stores were stocked with fine teas, linens, wines, and other goods from all over the world.

CONFEDERATION TODAY

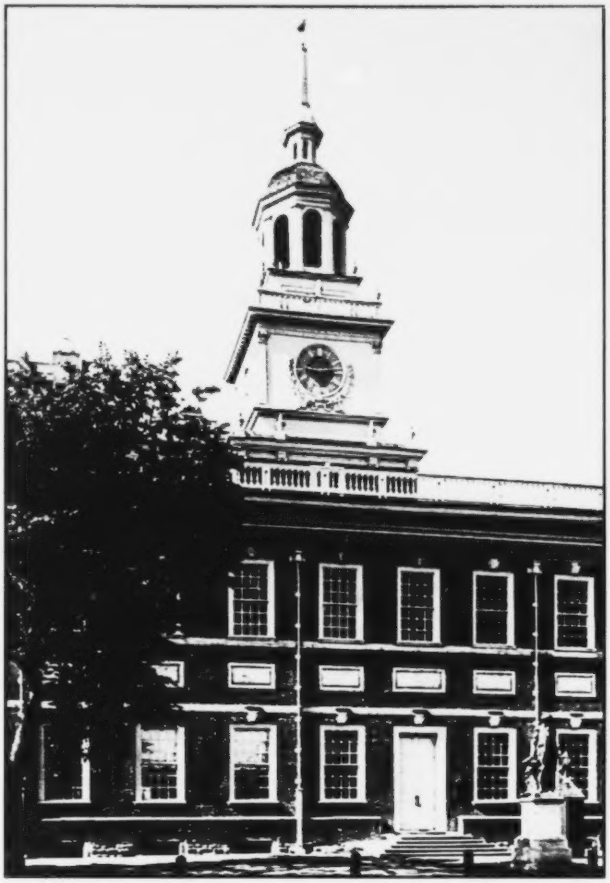
NEW YORK—Congress did not convene today, lacking a quorum. But that didn't stop Manasseh Cutler, lobbyist from Massachusetts, from doing business. Cutler, who wanted to buy over a million acres of Ohio land for the Ohio Company he represented, met with the Congressional committee appointed to decide the fate of the Northwest Territory. No agreement was reached.

His business plans in limbo, Cutler took time to describe the impressive chambers of Congress on the second floor of New York's Congress Hall. The quarters boasted a silk canopy over the President's chair, red damask curtains, mahogany desks, and morroco leather chairs for the delegates. Portraits of General Washington, other continental generals, and life-size likenesses of the King and Queen of France hung on the walls.

CONVENTION TODAY

Today, and for the rest of the week, the convention wrestled the thorny issue of how to choose representatives for Congress. Pennsylvanian Gouverneur Morris, as the chairman of the Committee of Five, presented a report recommending that the first house should consist of 56 members. In the committee's formula, Virginia, the largest state, would have 9 representatives, and Rhode Island and Delaware, the smallest states, would have 1. The legislature would regulate future representation based on wealth and population. One representative would be elected for every 40,000 inhabitants.

The delegates accepted the portion giving the legislature the power to regulate the number of representatives. But the section specifying the number of representatives from each state and limiting the total membership to only 56 was not satisfactory to many delegates. After a brief discussion, the matter was referred to a Committee of Eleven (made up of a member from each state present) for resolution.



DELEGATES TODAY

In the morning, Washington posed for the popular local artist, Charles Willson Peale. In the evening, he dined at the home of Pennsylvania delegate Robert Morris, his host and a leading Philadelphia merchant. Later he accompanied Mrs. Morris to the home of Dr. John Redman, a prominent physician, for tea. He also wrote a letter to Hector St. John De Crevecoeur, a Frenchman who had just arrived in this country. He thanked him for his offer to transmit letters to the Marquis de Lafayette, whom Washington called his "good and much esteemed friend."

Daniel Carroll of Maryland took his seat in the convention today.

LOOKING BACK

Wealth or Population?

During the convention, the delegates struggled with various methods to decide representation. Now the issue had narrowed down to wealth and population. Every member agreed that both wealth and population should be the qualifications for representation. Population was fairly simple to measure, but wealth was difficult to quantify. The slave and plantation economy of the South represented greater wealth than the small farm and commercial society of the North. Should slaves, then, be counted as wealth or population? William Paterson of New Jersey suggested that slaves be counted as property rather than as part of the population. In a similar view, Rufus King of Massachussetts wanted the slave population counted in the apportionment for taxation. With a combination of both proposals, slaves could be counted as wealth and population. Yet, while population and taxation might be linked, the delegates could not decide a meaningful way to tie other types of wealth to representation. In other words, the delegates were not so much opposed to wealth as a determining factor; they simply could not devise a method to quantify it.

Tuesday, July 10, 1787

PHILADELPHIA TODAY

On this warm, sunny day, the Supreme Court of Pennsylvania summoned two Quakers to serve as jurors. Since the Quaker faith prohibited taking oaths, the two men disqualified themselves from service. The Chief Justice refused to accept their position and fined them 61 pounds each and sent them to jail until they paid the penalty. The two Quakers challenged the decision with a writ of habeus corpus, questioning whether the judge had the authority to impose the fine and commit them to jail for non-payment.

CONFEDERATION TODAY

NEW YORK—Again Congress did not have enough states to make a quorum. Massachusetts lobbyist, Manasseh Cutler, met with the committee of Congress continuing his negotiations to purchase land for the Ohio Company. At the same time the committee was drafting the Northwest Ordinance, which would establish a system of government for the area northwest of the Ohio River. During his stay in New York, Cutler had developed a strong rapport with the committee members, and he reported that he had looked at a draft of the ordinance and submitted his remarks and proposed amendments to the committee.

Cutler would leave for Philadelphia the next day, but before his departure, he described his final dinner with several members of Congress. In addition to a tasty meal, he sampled not less than ten varieties of wine, as well as "bottles of cyder, porter, and several other kinds of strong beer."

CONVENTION TODAY

The delegates continued their discussion of representation in the House, focusing on the number of congressmen that would be elected from each state. The Committee of Eleven, appointed the previous day, recommended increasing the number of representatives from 56 to 65. Several counter-proposals suggested different numbers, but each motion was defeated. During the course of the debate, James Madison of Virginia moved that the number of representatives should be doubled. He argued that the majority of a simple quorum of 65 members was too small to represent and vote for all the inhabitants of the United States. Although several members agreed with Madison, the body voted 9 to 2 to leave the number of congressmen at 65 members.

DELEGATES TODAY

In a letter to Alexander Hamilton, who had returned to New York, George Washington expressed his frustration with the convention's lack of progress and with those who hesitated to create a strong national government. "I almost despair of seeing a favourable issue to the proceedings of our Convention, and do therefore repent having had any agency in the business."

Later that day he dined with his host Robert Morris. That evening went to the Southwark Opera House just south of the city limits to attend a James Townley play, *High Life Below the Stairs*.

LOOKING BACK

State Sumptuary Laws

Pennsylvania's sumptuary laws reflected the prevailing belief of the era that the conduct of the individual in his community directly influenced the public welfare. After the War for Independence, the theater was banned in Pennsylvania as "unbecoming republican virtue and frugality." Nevertheless, until the state repealed its sumptuary law in 1789, plays often were disguised as lectures or moral dialogues. Hamlet, for instance, was advertised as "a Moral and Instructive Tale called Filial Piety: Exemplified in the History of the Prince of Denmark." The play George Washington attended on this day was advertised as a "concert" with the title "The Servants Hall in an Uproar." Incidentally, the Southwark Opera House actually was a theater.

Wednesday, July 11, 1787

PHILADELPHIA TODAY

On this hot, partly cloudy day, the Mutual Assurance Company completed its survey and issued a policy on Benjamin Franklin's two new three-story rental houses on Market Street. The ingenious Dr. Franklin "fireproofed" his houses by plastering the floors between the joists, under the steps and risers of the stairs, and the walls and ceilings as well. Since the insurance surveyor, Mr. I. Jones, made special reference to the extensive plaster work in his report, he obviously was impressed with the extra fire suppression details made by the inventive doctor.

CONFEDERATION TODAY

NEW YORK—An ordinance to establish a government in the vast area north and west of the Ohio River was read before Congress for the first time today. It was assigned for a second reading the next day.

Secretary of War Henry Knox reported that hostile Indians were plundering villages and murdering the inhabitants on Virginia's frontiers. Although a 1500-man army could protect the frontier, he noted that the government could not support such a large force. The Secretary recommended that Colonel Josiah Harmar, commander and chief of the armed forces, should try to make a peace treaty. If he failed, Harmar could call out the Kentucky and Pennsylvania frontier militia to attack the Indians.

CONVENTION TODAY

The delegates agreed that a census would be taken every ten years to measure the population and determine representation in the House. But just how the census would be counted was not clear and the debate on the issue was lively. Many delegates had balked at a proposal to count slaves at a three-fifths ratio of the actual population. South Carolinians Pierce Butler and General Charles Pinckney believed blacks should be counted equally with whites, which was voted down. Northerners such as James Wilson of Pennsylvania wondered if blacks should be considered as citizens—each would be counted in the census—or as property, which would mean that none were included. The convention recessed without reaching a decision on how the census was to be implemented.

DELEGATES TODAY

John Langdon of Portsmouth, N.H. was in such a hurry to leave for Philadelphia his friend, Richard Champney, did not have an opportunity to ask him to purchase a flax cleaning machine. Champney hoped Langdon could buy the equipment for about 30 pounds and have it delivered by September for the flax harvest. With the new machine, Portsmouth would not need to rely on Boston for processing flax seed. Langdon purchased the machine and shipped it home.

William Paterson of New Jersey noted in a letter to his wife that during this week of intense debate Philadelphia was unbearably hot. In fact, he wrote that it was "the warmest place I have been in."

LOOKING BACK

Fire Insurance Companies

Fire insurance companies formed in England shortly after the Great Fire of London in 1666 and were well established by the early eighteenth century. Not until 1752 when Benjamin Franklin and other prominent Philadelphians formed The Philadelphia Contributionship for the Insurance of Houses from Loss by Fire, however, was fire insurance successfully launched in the New World. An earlier attempt in Charleston, South Carolina had failed after only four years when a large fire swept the city and bankrupted the company.

Franklin and his colleagues planned their new venture carefully, presumably patterning the company after the mutual system of insurance of the Amicable Contributionship of London. They drafted articles of agreement, which hung in the courthouse, and obtained favorable responses from 75 individuals. Within a few months the Philadelphia Contributionship began operation, its directors examining surveys, issuing policies and ordering fire marks - four clasped hands on wood - to be placed on insured structures. The company's success paved the way for other insurance ventures, but it wasn't until 1784 that its first competitor - The Mutual Assurance Company for Insuring Houses from Loss by Fire - formed. A decision by the membership of the Contributionship to ban trees in front of insured properties (no doubt fearing it hampered the efforts of fire fighters) caused a number of policyholders to break away and, together with other Philadelphians, form a new company which would accept trees in front of such properties as an additional risk. Not surprisingly they chose as their symbol a green tree which appeared on policies, the company's seal and its fire marks—resulting in the company's nickname, The Green Tree. This too was a mutual company where no one individual achieved personal gain; it provided protection for all.

Residents of other states were, no doubt, aware of these ventures, and eventually followed suit, the earliest being the Mutual Assurance Company for Insuring Houses from Loss by Fire in New York in April of 1787.

These appeared to be the only fire insurance companies operating in this country prior to the Constitutional Convention. With the promise and later fulfillment of a new more effective system of government, however, and an improved economy other companies formed—stocks as well as mutuals.

Only two of these early companies survive: The Philadelphia Contributionship and the Mutual Assurance Company. Both have prospered over the centuries and expanded their geographic areas of operation as well as their products. They remain today, as in the past, friendly competitors.

CONVENTION TODAY

The delegates continued their discussion on the method for determining representation in the House, gradually moving toward a spirit of compromise. Gouvernour Morris of Pennsylvania argued that states and people should be taxed in proportion to the number of representatives in Congress. During the debate, Morris was convinced to change his motion to read that states and people should be taxed "directly." The amended motion was adopted.

At the conclusion of today's discussion, the Convention voted to give the legislature the power to vary representation according to wealth and numbers of inhabitants. William Samuel Johnson probably expressed the feelings of many delegates when he stated that population could actually be one of the best measures of wealth. He also stated that the number of blacks should be included in any computation for representation, which would marry wealth and population together. A census would be taken six years after the adoption of the Constitution and, thereafter, each ten years. All free inhabitants and 3/5 of the slaves would be counted.

DELEGATES TODAY

George Washington dined at the Morris house and drank tea with Mrs. Anne Livingston. Mrs. Livingston was the daughter of Dr. William Shippen and the estranged wife of Henry Beekman Livingston, son of Judge Robert R. Livingston. The general had tea with Mrs. Livingston several times during the convention.

Thursday, July 12, 1787

PHILADELPHIA TODAY

The weather continued hot (mean of 77°), despite the clouds. The front page of the *Pennsylvania Gazette* contained ads for five books and pamphlets, ranging from "An Oration—Commemorating the Independence of the U.S." to "Dr. Young's Night Thoughts" to "An Essay—On the Causes of the Variety of Complexion and Figure in the Human Species." The publishing industry flourished in Philadelphia as did the newspaper business. At this time, there were ten newspapers published in the city.

CONFEDERATION TODAY

NEW YORK—Secretary of War Henry Knox reported a letter from Colonel Harmar, which stated that the illegal settlers he had been sent to evict from Vincennes, a settlement on the Wabash River, were gone. Knox noted that the expedition was not a complete loss, because Harmar was in a position to deal with the Wabash Indians if they should attack the settlements.

The Board of Treasury recommended that a Pennsylvania

Continental Officer should not be paid for his unsettled accounts until it received a certificate from the Commissioner of Army Accounts stating that the claimant did not owe any money to the government. The bureaucracy was alive and well in the 1780s.

LOOKING BACK

The Indian Situation

At the conclusion of the Revolutionary War, Congress was faced with the problems of governing and disposing of the lands west of the Appalachians. By 1787 several states had abandoned their claims to various areas and the Land Ordinance of 1785 provided an orderly system to partition and sell the land. Another problem was what to do with the Indians. In 1783 Congress appointed a five-man commission to meet the natives and establish a boundary between white and Indian settlements to the Falls of the Ohio River. The Iroquois were bullied into giving up their claims in the Northwest with a few paltry presents in 1784. Several months later the Chippewa, Ottawa, Delaware, and Wyandot tribes were intimidated into surrendering their lands and in turn were forced on to reservations.

These accommodations were unsatisfactory both to the natives and the white settlers. Between 1785 and 1787 frontiersmen invaded Indian lands and the natives attacked whites. Colonel Harmar was appointed to command the federal military force in the area and lands. Harmar attempted to keep the frontier under control, but his limited resources in money and manpower made the job difficult. Throughout 1787 the many references to Indians suggests that the government was fearful of potential wide-scale violence on the frontier—without adequate power to deal with the situation.

Friday, July 13, 1787

PHILADELPHIA TODAY

The heat spell broke, giving Philadelphians a pleasant sunny day (mean 71°), "but very dusty."

John Mason, a Philadelphia upholsterer, advertised price cuts of one-third in the *Pennsylvania Chronicle*: venetian blinds for 7 shillings 6 pence; hand-made easy chairs for 15 shillings; and rooms papered at 2 pence per yard.

Renaissance man Manasseh Cutler, a Massachusetts minister, lobbyist, doctor, schoolmaster, lawyer, botanist, astronomer and colonizer, spent the day sightseeing. He visited the State House and its yard (Independence Square), the University of Pennsylvania (he was not impressed), Peale's Museum (he was very impressed) and several houses of worship. He also called on five important persons, including Bishop William White of Christ Church, Massachusetts delegate Elbridge Gerry and Dr. Franklin—with whom he had tea.

CONFEDERATION TODAY

NEW YORK—The Congress had a quorum and could act. And act it did, giving a third reading to and passing the Northwest Ordinance, one of the most significant pieces of legislation in the country's history. By providing a new system of government for the area northwest of the Ohio River, the law further opened the frontier to settlement and paved the way for the admittance of new states into the union.

CONVENTION TODAY

The delegates continued debating the report of the July 2 committee recommending the Connecticut compromise—proportional representation in the House and equal representation by state in the Senate. Old issues were rehashed and progress seemed slow.

Edmund Randolph of Virginia moved to drop wealth as a factor in fixing each state's representatives in Congress and use free population plus 3/5 of the slave population as a basis for representation. Gouverneur Morris of Pennsylvania opposed it saying that if slaves were people they should be fully represented and if they were property they should not be represented at all. Randolph's motion passed, 9-0-1.

DELEGATES TODAY

Massachusetts delegate Caleb Strong and Manasseh Butler breakfasted at Massachusetts delegate Elbridge Gerry's rented house on Spruce Street. Later that afternoon Gerry accompanied Cutler to Franklin Court. Cutler was enthralled with Franklin the man, his library, and practical inventions. These inventions included: a large rocking chair equipped with a fan operated with a simple foot pedal, a long artificial arm and hand that took books from his library shelves, and a letter copying press designed to make a facsimile of written or printed documents.

During the conversation, Franklin produced a pickled two-headed snake in a vial. The doctor "was then going to mention a humorous matter that had that day taken place in the Convention in consequence of his comparing the snake to America," Cutler wrote, "[but] he seemed to forget that everything in Convention matters was [to be held in strict confidence] which stopped him, and deprived me of the story he was going to tell."

Jonathan Dayton of New Jersey wrote William Livingston, governor of his state and the leader of his delegation, to vent his frustration at the lack of progress in the convention. Yet he added that it would be improper to relate any specific information.

LOOKING BACK

With little discussion and virtually no opposition, the United States in Congress Assembled passed the Northwest Ordinance today. By this action, Congress made a fundamental break with traditional European practices. Instead of acquiring new territories as colonies subject to the rule of a parent state, the United States decided that newly acquired areas could become full-fledged states with all privileges and responsibilities of the original thirteen.

Each would go through three phases of government. First, it would be ruled by a governor appointed by Congress; second, when the male population reached 5,000, the citizens could elect a legislature and send a delegate to Congress; and third, when there were 60,000 people, the territory could enter the Union as a state—completely equal to the original thirteen. A bill of rights guaranteed each citizen freedom of speech, worship, and other basic liberties. As a final and important provision, the ordinance prohibited slavery.

Although the population requirements have changed, the process of admission established by the Northwest Ordinance continues today. Alaska and Hawaii were admitted as states in 1959.

THE FABRICATION OF THE AMERICAN REPUBLIC, 1776–1800: A SYLLABUS

by JACK P. GREENE

This syllabus has been designed under the auspices of Project '87 to provide a common group of readings for a series of seven discussion seminars to be organized by libraries or community groups for the American Constitutional Bicentennial. These seminars are intended to help people obtain a deeper understanding of the historical process that led to the creation of the American republic and the Federal Constitution. Primary reading materials are all from documents of the period published in paperback volumes. They have been selected so that no more than four hours of reading time will be required for each seminar. To help people put these materials into a broader historical perspective, the syllabus suggests brief supplementary readings, also available in paperback editions, from some of the better secondary works on the constitutional era.

SOURCE BOOKS THAT THE SYLLABUS WILL CITE BY SHORT TITLE:

J. Hector St. Jean de Crèvecoeur, *Letters from an American Farmer* (ed. Albert E. Stone, New York: Penguin Books, 1981). $4.95. Cited as *Letters from an American Farmer.*

Jack P. Greene, ed., *Colonies to Nation, 1763–1789: A Documentary History of the American Revolution* (New York: W. W. Norton, 1975). $11.95. Cited as *Colonies to Nation.*

Cecilia M. Kenyon, ed., *The Antifederalists* (Boston: Northeastern Univ. Press, 1986). $9.95. Cited as *Antifederalists.*

Adrienne Koch, ed., *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Athens, Ohio: Ohio University Press, 1966). $16.00. Cited as *Notes of Debates.*

Marvin Meyers, ed. *The Mind of the Founder: Sources of the Political Thought of James Madison* (New York: Irvington, 1981). $7.75. Cited as *Madison.*

Richard B. Morris, ed., *Alexander Hamilton and the Founding of the Nation* (New York: Harper & Row, 1969). Out of Print. Cited as *Hamilton.*

Merrell Peterson, ed., *The Portable Thomas Jefferson* (New York: Penguin Books, 1977). $7.95. Cited as *Jefferson.*

Clinton Rossiter, ed., *The Federalist* (New York: New American Library, 1961). $2.95. Cited as *Federalist.*

Gordon S. Wood, ed., *The Rising Glory of America, 1760–1820* (New York: George Braziller, 1971). $4.95. Cited as *Rising Glory.*

Seminars

1. EXPERIMENTS IN REPUBLICAN GOVERNMENT

Readings:

The Road to Independence

Thomas Paine, *Common Sense*, 1776, in *Colonies to Nation*, pp. 270–83.

William Smith, Jr., "Thoughts as a Rule for my own Conduct," June 9, 1776, in *Colonies to Nation*, pp. 286–91.

Landon Carter, Diary, May 1, 29, 1776, in *Colonies to Nation*, pp. 291–92.

John Dickinson, "Arguments Against . . . Independence," July 1, 1776, in *Colonies to Nation*, pp. 292–96.

John Adams to Abigail Adams, July 3, 1776, in *Colonies to Nation*, pp. 296–97.

The Declaration of Independence, July 4, 1776, in *Colonies to Nation*, pp. 297–301.

Prescriptions for Independent Government

John Adams, *Thoughts on Government*, 1776, in *Colonies to Nation*, pp. 306–11.

Four Letters on Interesting Subjects, 1776, in *Colonies to Nation*, pp. 311–15.

"The Interest of America," 1776, in *Colonies to Nation*, pp. 315–18.

Carter Braxton, *Address to the Convention of . . . Virginia*, 1776, in *Colonies to Nation*, pp. 318–25.

The People the Best Governors, 1776, in *Colonies to Nation*, pp. 325–332.

Two Early Constitutions

The Virginia Bill of Rights, June 12, 1776, in *Colonies to Nation*, pp. 332–34.

The Virginia Constitution, June 29, 1776, in *Colonies to Nation*, pp. 336–39.

The Pennsylvania Constitution, Sept. 28, 1776, in *Colonies to Nation*, pp. 339–45.

The People as Constituent Power: Constitution-Making in Massachusetts

The Concord Resolutions, Oct. 21, 1776, in *Colonies to Nation*, pp. 347–48.

Theophilus Parsons, *Result of the Convention of Delegates . . at . . . Ipswich*, May 12, 1778, in *Colonies to Nation*, pp. 348–52.

An Address of the Convention . . . to their Constituents, 1780, in *Colonies to Nation*, pp. 352–57.

Problems with the Early Constitutions

Benjamin Rush, *Observations Upon the Present Government of Pennsylvania*, 1777, in *Colonies to Nation*, pp. 359–69.

Thomas Jefferson, *Notes on the State of Virginia*, 1781–82, in *Colonies to Nation*, pp. 369–74.

Supplementary Background Reading:

Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (New York: W. W. Norton, 1969). $10.95. pp. 125–255.

2. THE DEMANDS AND PROMISES OF A REPUBLICAN SOCIETY IN AMERICA

Readings:

The New World and the Old

John Adams, *On the Feudal and the Canon Law*, 1765, in *Rising Glory*, pp. 25–39.

Crèvecoeur, *Letters from An American Farmer*, pp. 66–105.

Samuel Williams, *A Discourse on the Love of Country*, 1774, in *Colonies to Nation*, pp. 376–86.
Richard Price, *Observation on the Importance of the American Revolution*, 1784, in *Colonies to Nation*, pp. 422–25.

The Need for Virtue

John Warren, *An Oration, Delivered July 4th, 1783*, in *Rising Glory*, pp. 55–69.
Samuel Adams, et. al., "The Sans Souci Club," 1785, in *Rising Glory*, pp. 137–53.

Education for a Republic

Benjamin Rush, *Thoughts upon the Mode of Education Proper in a Republic*, 1786, in *Colonies to Nation*, pp. 399–404.
Noah Webster, *A Collection of Essays and Fugitive Writings*, 1790, in *Rising Glory*, pp. 154–72.

God's Kingdom in America

Jonathan Parsons, *Freedom from Civil and Ecclesiastical Slavery*, 1774, in *Colonies to Nation*, pp. 388–90.
Isaac Backus, *A Door Opened for Equal Christian Liberty*, 1783, in *Rising Glory*, pp. 71–77.
The Virginia Statute for Religious Freedom, January 16, 1785, in *Colonies to Nation*, pp. 390–92.
Samuel Hopkins, *A Treatise on the Millennium*, 1793, in *Rising Glory*, pp. 41–51.

Republicanism and Chattel Slavery

Richard Wells, *A Few Political Reflections*, 1774, in *Colonies to Nation*, pp. 392–396.
Henry Laurens to John Laurens, Aug. 14, 1776, in *Colonies to Nation*, pp. 396–97.
Thomas Jefferson, *Notes on the State of Virginia*, 1781–82, in *Colonies to Nation*, pp. 397–98.

Supplementary Background Reading:

Wood, *Creation of the American Republic*, 46–124.

3. A LESS THAN PERFECT UNION

Readings:

The First National Constitution

The Articles of Confederation, Mar. 1, 1781, in *Colonies to Nation*, pp. 428–36.

The Problematic Character of National Survival

George Washington's Circular Letter to the States, June 8, 1783, in *Colonies to Nation*, pp. 436–43.

Tensions and Problems

Alexander Hamilton, *A Letter from Phocion*, and *A Second Letter from Phocion*, 1784, in *Colonies to Nation*, pp. 445–53.
George Mason to Patrick Henry, May 6, 1783, in *Colonies to Nation*, pp. 453–55.
Aedanus Burke, *Considerations on the Order of Cincinnati*, Oct. 10, 1783, in *Colonies to Nation*, pp. 455–66.
Charles Pinckney, *Speech . . . on the Question of a Treaty with Spain*, Aug. 16, 1786, in *Colonies to Nation*, pp. 474–80.
"Curtius" vs. "Willing to Learn" on the "Honesty" of Paper Money, *The Political Intelligencer, And New-Jersey Advertiser*, Jan. 4, 25, 1786, in *Colonies to Nation*, pp. 481–95.
Debates and Proceedings of the General Assembly of Pennsylvania on . . . the Charter of the Bank [of North America], 1786, in *Colonies to Nation*, pp. 495–505.
Discontent in Massachusetts: The Votes of the Hampshire County Convention, Aug. 22, 1786, in *Colonies to Nation*, pp. 506–07.
George Washington to Henry Knox, Dec. 26, 1786, in *Colonies to Nation*, pp. 507–08.

Successes of the Articles

The Land Ordinance of 1785, in *Colonies to Nation*, pp. 466–69.
The Northwest Ordinance, July 13, 1787, in *Colonies to Nation*, pp. 469–74.

Movement for Constitutional Reform

Address of the Annapolis Convention, Sept. 14, 1786, in *Colonies to Nation*, pp. 509–11.
James Madison, "Vices of the Political System of the United States," Apr. 1787, in *Colonies to Nation*, pp. 514–19.

Supplementary Background Reading:

Wood, *Creation of the American Republic*, 393–467, or Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (Baltimore: The Johns Hopkins Press, 1983). $8.95. pp. 243–399.

4. FRAMING THE CONSTITUTION: CONSENSUS AND COMPROMISE

Readings:

The Virginia Plan and the Debate over the Structure of National Government

Convention Debates, May 29–June 4, June 7, 13, 1787, in *Notes on Debates*, pp. 26–27, 81–87, 115–17.

Alternative Proposals

Convention Debates, June 16, 18, 1787, in *Notes on Debates*, pp. 118–21, 129–31.

Deadlock and Compromise

Convention Debates, June 19, 25–26, 29, 30, July 2, 5, 13, 16, 1787, in *Notes on Debates*, pp. 140–48, 151–54, 181–201, 211–19, 226–42, 297–302.

Clash of Interests

Convention Debates, July 16, Aug. 21–22, 25, 19, 1787, in *Notes on Debates*, pp. 266–276, 458–59, 530–31, 547–52.

The Definition and Role of the People

Convention Debates, July 23, Aug. 7, 9, 1787, in *Notes on Debates*, pp. 348–53, 396–405, 418–22.

Appraisals of the Convention's Work

Convention Debates, Sept. 12, 15, 17, 1787, in *Notes on Debates*, pp. 630, 650–59.

The Finished Constitution

The Constitution of the United Sates, September 17, 1787, in *Colonies to Nation*, pp. 547–56.

Supplementary Background Reading:

Max Farrand, *The Framing of the Constitution* (New Haven: Yale Univ. Press, 1962). $8.95. pp. 54–123, or Clinton Rossiter, *1787: The Grand Convention* (New York: Macmillan, 1966). Out of Print. pp. 79–256.

5. NEW LIGHT ON THE SCIENCE OF GOVERNMENT: ATTACK ON THE CONSTITUTION

Readings:

Objections to the Constitution

George Mason, *Objections . . . to the Proposed Constitution*, Oct. 1787, in *Antifederalists*, pp. 191–95.
Richard Henry Lee[?], *Letters from the Federal Farmer*, Oct. 1, 1787, in *Antifederalists*, pp. 197–208.

Fear of Consolidation

Lee[?], *Letters from a Federal Farmer*, Oct. 9, 1787, in *Antifederalists*, pp. 208–14.
Thomas Tredwell, Speech in the New York Ratifying Convention, June 1788, in *Antifederalists*, pp. 392–405.

Impossibility of Republican Government in a Large Territory

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Inadequacy of Representation

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6. NEW LIGHT ON THE SCIENCE OF GOVERNMENT: THE FEDERALIST EXPLANATION

Readings:

The Advantages of Union and the Virtues of the Constitution

Alexander Hamilton, *Federalist* #1, #15, pp. 33–37, 105–13.
John Jay, *Federalist* #2, pp. 37–41.
James Madison, *Federalist* #37, pp. 224–31.

Fear of Disunion

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The Promise of Republican Government in an Extensive Territory

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Adequacy of Representation

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Sufficiency of Checks and Balances

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Defending the Construct

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A Device for Sectional Accommodation

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7. THE NEW REPUBLIC: ALTERNATIVE VISIONS

Readings:

The People and Their Government

Thomas Jefferson to Edward Carrington, Jan. 16, 1787, in *Jefferson*, pp. 414–15.
Jefferson to James Madison, Jan. 30, 1787, in *Jefferson*, pp. 415–18.
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Joyce Oldham Appleby, *Capitalism and a New Social Order: The Republic Vision of the 1790s* (New York: New York Univ. Press, 1984). $10.00. pp. 1–105.

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Bicentennial Gazette

Directory of Bicentennial Organizations

This directory of Bicentennial organizations, drawn from information available to Project '87 and to the Commission on the Bicentennial of the United States Constitution, is designed to provide brief information about groups planning national programs. The list is not comprehensive and many organizations now planning programs may not be included. The list also does not include local or state groups, colleges or universities, media organizations or most federal agencies. More information on those institutions can be obtained from the Commission on the Bicentennial, at the address below, and from the state Bicentennial commissions (listed in **this Constitution,** *Spring 1987).*

The programs are described by the following key: AV-audio-visual; C-competitions; ED-educational programs; EX-exhibits; M-meetings, conferences or lectures; P-publications; TM-teaching materials. V-Organizations identified by the letter "V" are those planning major Bicentennial programs that include an array of events and publications. These organizations create materials for a wider audience.

Action for Children's Television
46 Austin Street
Newtonville, MA 02160
(617) 527-7870
(AV)

Agency for Instructional Technology
Box A
Bloomington, IN 47402
(812)339-2203
(AV)

American Association of Community and Junior Colleges
National Center for Higher Education
One Dupont Circle, No. 410
Washington, D.C. 20036
(202) 293-7050
(M)

American Bankers Association
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 467-4000
(ED&C)

American Bar Association
750 North Lakeshore Drive
Chicago, IL 60611
(312) 988-5728
(V)

American Civil Liberties Union
132 West 43rd Street
New York, NY 10036
(212) 944-9800
(ED)

American Conservative Union
38 Ivy St., S.E.
Washington, D.C. 20003
(202) 546-6555
(M,P)

American Council of the Blind
1010 Vermont Ave., N.W.
Suite 1100
Washington, D.C. 20005
(202) 393-3666
(M,P)

American Enterprise Institute
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 862-5920
(V)

AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
(ED)

American Federation of Teachers
555 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 879-4400
(ED & TM)

American Historical Association
400 A Street, S.E.
Washington, D.C. 20003
(202) 544-2422
(See Project '87)

American Hotel and Motel Association
888 Seventh Ave.
New York, NY 10106
(212) 265-4506
(AV, EX)

American Judicature Society
25 East Washington St.
Chicago, IL 60602
(312) 558-6900
(AV)

American Legion
P.O. Box 1055
700 N. Pennsylvania St.
Indianapolis, IN 46204
(317) 635-8411
(V)

American Library Association
50 E. Huron St.
Chicago, IL 60611
(312) 944-6780
(V)

American Management Association
135 W. 50th St.
New York, NY 10020
(212) 586-8100
(EX)

American Newspaper Publishers Association
The Newspaper Center
Box 17407
Dulles International Airport
Washington, D.C. 20041
(703) 648-1000
(ED, TM)

American Philatelic Society
P.O. Box 8000
State College, PA 16803
(814) 237-3803
(EX)

American Philosophical Society
104 South Fifth St.
Philadelphia, PA 19106
(215) 627-0706
(EX, M)

American Political Science Association
1527 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 483-2512
(See Project '87)

Camp Fire, Inc.
4601 Madison Ave.
Kansas City, MO 64112
(816) 756-1950
(V)

Center for Civic Education
5115 Douglas Fir Road
Calabasas, California 91302
(818) 340-9320
(ED, M)

Center for the Study of the American Constitution
University of Wisconsin
Humanities Bldg., Rm. 5218
Madison, WI 57306
(608) 263-1865
(P)

Center for the Study of the Constitution
P.O. Box 987
Carlisle, PA 17013
(717) 245-1280
(M, P)

Chamber of Commerce of the United States
1615 H St., N.W.
Washington, D.C. 20062
(202) 659-6000
(V)

Chicago Historical Society
Clark St. at North Ave.
Chicago, Illinois 60614
(312) 642-4600
(EX)

The Claremont Institute for the Study of Statesmanship
4650 Arrow Highway
Suite D-6
Montclair, CA 91763
(714) 621-6825
(M)

Close Up Foundation
1235 Jefferson Davis Hwy.
Arlington, VA 22202
(703) 892-5400
(V)

Commission on the Bicentennial of the United States Constitution
736 Jackson Place, N.W.
Washington, D.C. 20503
(202) 872-1787
(V)

Committee on the Constitutional System
1755 Massachusetts Avenue, N.W., Suite 410
Washington, D.C. 20036
(202) 387-8787
(M, P)

Communications Workers of America
1925 K St., N.W.
Washington, D.C. 20006
(202) 728-2382
(P)

Congressional Youth Leadership Council
1511 K St., N.W.
Washington, DC 20005
(202) 638-0008
(ED)

Council for the Advancement of Citizenship
One Dupont Circle
Washington, DC 20036
(202) 861-2583
(M)

Daughters of the American Revolution
1776 D St., N.W.
Washington, D.C. 20006
(202) 628-1776
(V)

Disabled American Veterans
3725 Alexander Pike
Cold Spring, KY 41076
(606) 441-7300
(P)

Federation of State Humanities Councils
1012 14th St., N.W., Suite 1207
Washington, D.C. 20005
(202) 393-5400
(P)

Independence National Historical Park
313 Walnut Street
Philadelphia, PA 19106
(215) 597-7127
(V)

Girl Scouts of the U.S.A.
830 Third Ave. and 51st St.
New York, NY 10022
(212) 940-7500
(ED, M)

Girls Clubs of America
205 Lexington Avenue
New York, NY 10016
(212) 689-3700
(V)

Historical Society of Pennsylvania
1300 Locust Street
Philadelphia, PA 19107
(215) 732-6200
(EX, AV)

History Teaching Alliance
400 A Street, S.E.
Washington, D.C. 20003
(202) 544-2422
(ED)

Institute of Early American History and Culture
The College of William and Mary and Colonial Williamsburg
P.O. Box 220
Williamsburg, VA 23187
(804)253-5117
(M, P)

Jefferson Foundation
1529 18th St., N.W.
Washington, D.C. 20036
(202) 234-3688
(TM)

Joint Center for Political Studies
1301 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20004
(202) 626-3500
(P)

League of Women Voters of the United States
1730 M St., N.W.
Washington, D.C. 20036
(202) 429-1965
(AV, M)

Library of Congress
Washington, D.C. 20540
(202) 287-5108
(EX, P)

The Lilly Library
Indiana University
Bloomington, IN 47405-3301
(812) 335-2452
(EX)

Lions Clubs International
300 22nd St.
Oak Brook, IL 60570
(312) 986-1700
(ED, EX)

Masons-Supreme Council, Ancient Accepted Scottish Rite of Free-Masonry (Northern Masonic Jurisdiction)
(Joint effort with Southern Jurisdiction)
P.O. Box 519
33 Marrett Rd.
Lexington, MA 02173
(617) 862-4410
(V)

The Mentor Group
160 Commonwealth Ave.
Boston, MA 02116
(617) 262-4555
(M)

National Archives
National Archives and Records Administration
Washington, D.C. 20408
(202) 523-3099
(V)

National Association of Secondary School Principals
1904 Association Dr.
Reston, VA 22091
(703) 860-0200
(C, ED)

National Association of Student Councils
1904 Association Dr.
Reston, VA 22091
(703) 860-0200
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National Center for Constitutional Studies
P.O. Box 37110
Washington, D.C. 20013
(202) 371-0008
(V)

National Conference of Christians and Jews
71 Fifth Ave.
New York, NY 10003
(212) 206-0006
(ED, TM)

National Council for the Social Studies
3501 Newark Street, N.W.
Washington, D.C. 20016
(202) 966-7840
(ED, TM)

National Endowment for the Humanities Bicentennial Initiative—Division of General Programs
1100 Pennsylvania Avenue, N.W.
Washington, D.C. 20506
(202) 786-0271
(V)

National History Day
11201 Euclid Ave.
Cleveland, OH 44106
(216) 421-8803
(C)

National Trust for Historic Preservation
1785 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 673-4000
(EX)

New-York Historical Society
170 Central Park West
New York, NY 10024-5194
(212) 873-3400
(EX, M, P)

New York Public Library
Fifth Avenue and 42nd St.
New York, NY 10018
(212) 930-0679
(V)

Organization of American Historians
112 N. Bryan St.
Bloomington, IN 47401
(812) 335-7311
(V)

Philadelphia Center for Early American Studies
University of Pennsylvania
3810 Walnut Street
Philadelphia, PA 19104
(215) 898-3487
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Evanston, IL 60201
(312) 328-0100
(P)

Smithsonian Institution
Office of the Assistant Secretary for History and Art
Washington, D.C. 20560
(202) 357-1776
(EX & M)

Supreme Court Historical Society
111 Second Street, N.E.
Washington, D.C. 20002
(202) 543-0400
(V)

United States Capitol Historical Society
200 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 543-8921
(V)

U.S. Department of Education
Office of the Deputy Under Secretary
Room 3073
400 Maryland Avenue, S.W.
Washington, D.C. 20202
(202) 732-4610
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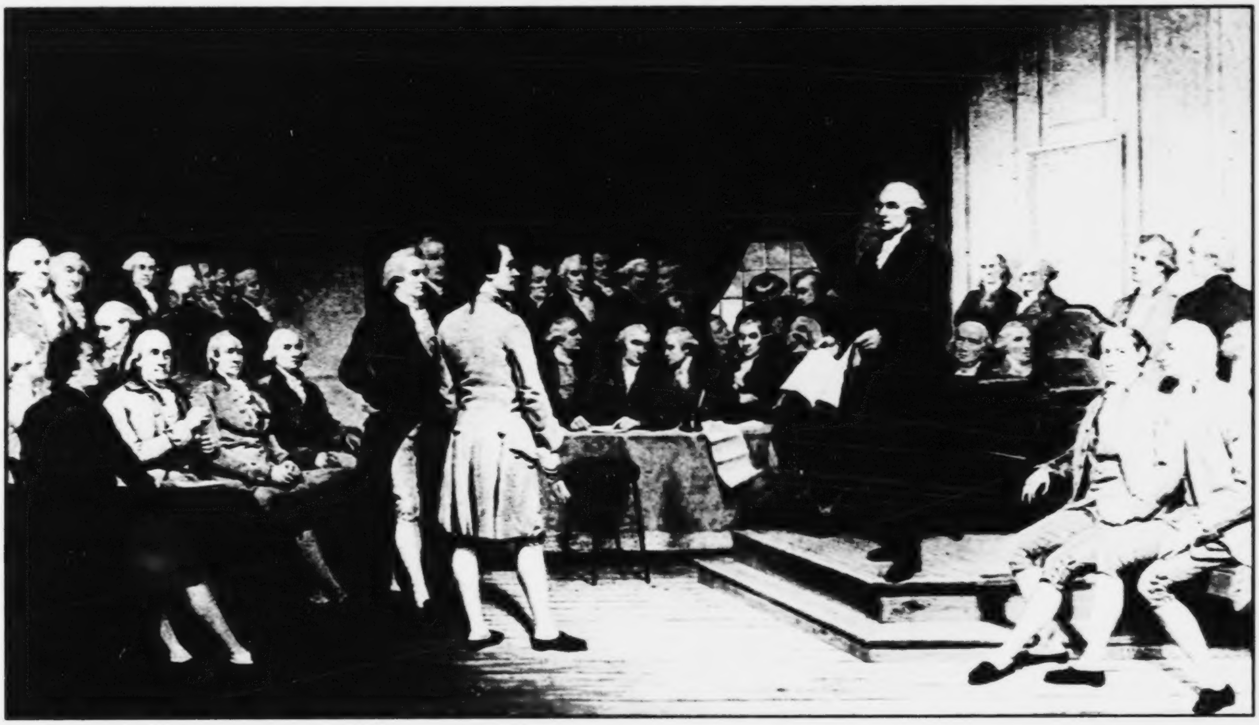

Washington Addressing the Constitutional Convention *by Junius Brutus Stearns. Virginia Museum. Richmond, VA.*

SECTION 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof: but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall [be on the first Monday in December,[3] unless they shall by Law appoint a different Day.

SECTION 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business: but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

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[3] This clause has been changed by the 20th Amendment.

SECTION 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their Respective Houses, and in going to and returning from the same: and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time: and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States: and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States: but all Duties, Imposts and Excises shall be uniform throughout the United States:

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standards of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings:—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

[No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.[4]

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law: and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

SECTION 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each: which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed: and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President: and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote: A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.[5]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes: which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.[6]

---

4. This clause has been affected by the 16th Amendment.

5. This clause has been superseded by the 12th Amendment.

6. This clause has been affected by the 25th Amendment.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States: he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur: and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls. Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient: he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper: he shall receive Ambassadors and other public Ministers: he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

SECTION 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States:[—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[7]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury: and such Trial shall be held in the State where the said Crimes shall have been committed: but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

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[7] This clause has been changed by the 11th Amendment.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

SECTION 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, records and Proceedings shall be proved, and the Effect thereof.

SECTION 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[8]

SECTION 3.

New States may be admitted by the Congress into this Union: but no new State shall be formed or erected within the Jurisdiction of any other State: nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States: and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion: and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article: and that no State without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in Pursuance thereof: and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution: but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

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[8] This clause has been superseded by the 13th Amendment.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth IN WITNESS whereof We have hereunto subscribed our Names.

G^{o}. Washington—Presid^{t}. and deputy from Virginia

New Hampshire

John Langdon
Nicholas Gilman

Massachusetts

Nathanial Gorham
Rufus King

Connecticut

W^{m}: Sam^{l}. Johnson
Roger Sherman

New York

Alexander Hamilton

New Jersey

Wil: Livingston
David Brearley
W^{m}. Paterson
Jona: Dayton

Pennsylvania

B Franklin
Thomas Mifflin
Robt. Morris
Geo. Clymer
Tho^{s}. FitzSimons
Jared Ingersoll
James Wilson
Gouv Morris

Delaware

Geo: Read
Gunning Bedford jun
John Dickinson
Richard Bassett
Jaco: Broom

Maryland

James McHenry
Dan of S^{t} Tho^{s}. Jenifer
Dan^{l}. Carroll

Virginia

John Blair
James Madison Jr.

North Carolina

W^{m}. Blount
Rich^{d}. Dobbs Spaight
Hu Williamson

South Carolina

J. Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler

Georgia

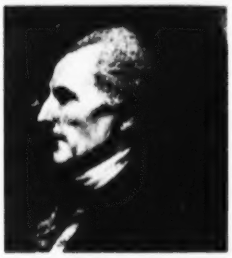
William Few
Abr Baldwin

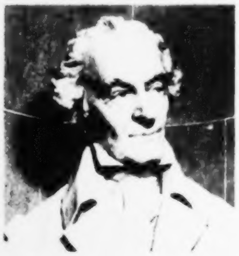
Attest William Jackson Secretary

During the ratification contest, several states emphatically expressed their desire that a bill of rights be added to the Constitution adopted by the Federal Convention in Philadelphia September 17, 1787. The First Congress complied and submitted twelve amendments to the states, following the procedures laid out in Article V. Ten of these amendments, now referred to as the Bill of Rights, were ratified by December 15, 1791.

...do ordain and establish
# this Constitution
for the United States of America.

A Bicentennial Chronicle Fall 1987, No. 16





Upon the whole, I doubt whether the opposition to the Constitution will not ultimately be productive of more good than evil; it has called forth, in its defence, abilities which would not perhaps have been otherwise exerted, that have thrown new light upon the science of Government; they have given the rights of man a full and fair discussion, and explained them in so clear and forcible a manner as cannot fail to make a lasting impression.

George Washington

Project '87

The Federalist

Number 51

(Published originally in the New York Packet, *Friday, February 8, 1788)*

James Madison

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is that as all these exterior provisions are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea I will hazard a few general observations which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; second, because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them.

It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

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...do ordain and establish
this Constitution
for the United States of America.

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Cover: (from top) Richard Henry Lee, Elbridge Gerry, George Clinton and Patrick Henry. Quotation: George Washington to John Armstrong, 25 April 1788, in *The Writings of George Washington*, edited by John C. Fitzpatrick, vol. 29, pp. 464–67. Courtesy of John R. Challinor. Cover design by Charles S. Snyder.

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this Constitution

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From the Editor

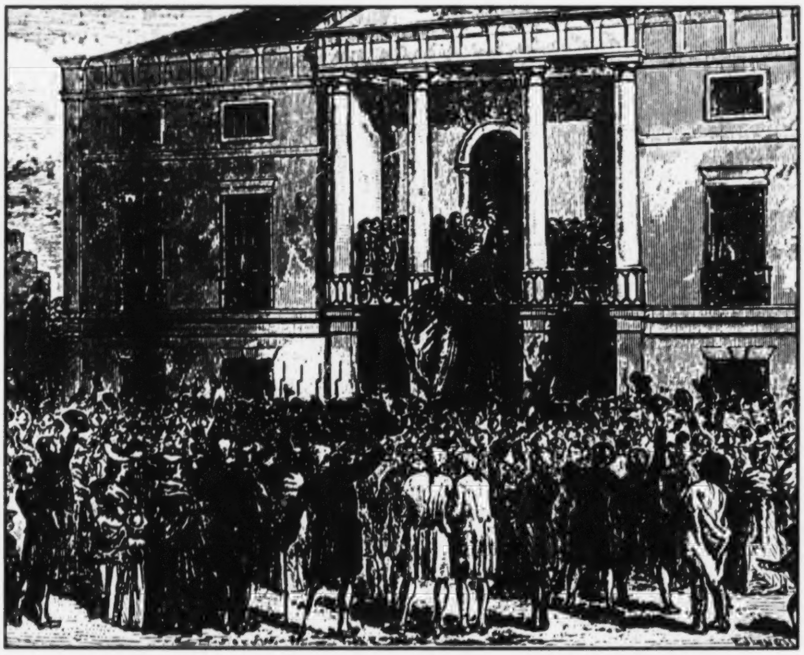
On September 17, 1787, the Federal Convention in Philadelphia formally adopted the Constitution. The delegates had worked for the better part of four months, arguing vehemently, then crafting delicate compromises. Their discussions had been completely secret. Only now would the rest of the American people get a look at, and have a say about, the character of the new frame of government.

In order to persuade their compatriots to ratify the work of the Convention, three of the Constitution's supporters wrote a series of newspaper articles published in New York City from October 1787 to May 1788. Writing anonymously under the name *Publius*, the authors, Alexander Hamilton, James Madison and John Jay, were driven by their sense of urgency about the need for the new Constitution. We cannot know whether their arguments, incorporated in *The Federalist*, convinced anyone, but *The Federalist* has endured as the best statement of what these proponents of the Constitution wanted the people to understand about the way the new government was expected to work.

In the first article in this issue, Jean Yarbrough lays out the chief arguments of *The Federalist* essays. Madison's *Federalist* No. 51 begins on the inside front cover. John J. Patrick and Clair W. Keller have adapted selections from *The Federalist* for students; one of the lessons, addressing separation of powers and checks and balances, appears in the "For the Classroom" section.

The Constitution's supporters had no easy task in winning approval of the new plan of government. Opponents of ratification included powerful and influential political figures. Although the "Anti-Federalists," as they were labeled, had no comparable plan to offer in place of the Constitution, their protests voiced a concern about the possibility of excessive authority exercised by a centralized government, a concern Americans have continued to share. Murray Dry explains the objections of the Anti-Federalists in his article on their constitutional philosophy.

Despite the energetic debates about the Constitution, its ratification



was the occasion for great celebrations in each state. Milton M. Klein describes how quickly the Constitution became an emblem of national unity in his article, "The Constitution as Myth and Symbol." The public's response to the new document came out in song as well as in essays, and in the "Documents" section Jannelle Warren-Findley reproduces the lyrics of the eighteenth-century songs on the Constitution, giving us a new perspective on the debate and the celebration.

The Bicentennial Gazette in this issue offers a special listing of educational resources and recent books on the Constitution.

Thirteen Enduring
Constitutional Issues

- National Power—Limits and Potential
- Federalism—the Balance between Nation and State
- The Judiciary—Interpreter of the Constitution or Shaper of Public Policy
- Civil Liberties—the Balance between Government and the Individual
- Criminal Penalties—Rights of the Accused and Protection of the Community
- Equality—its Definition as a Constitutional Value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
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The Federalist

by JEAN YARBROUGH

On September 17, 1787, after four months of deliberation and compromise, the Federal Convention concluded its business in Philadelphia and forwarded a copy of the proposed Constitution to Congress for further action. According to the new plan of government, nine states would have to ratify the Constitution before it could go into effect. Immediately after adjournment, Alexander Hamilton, New York delegate to the Convention and one of the Constitution's chief supporters, launched an ambitious newspaper campaign to secure ratification in his home state.

Both supporters and opponents of the Constitution recognized the pivotal importance of New York. Not only did New York provide the crucial link between the New England states and the rest of the country, but it was the seat of government under the Articles of Confederation. A negative vote in New York would surely affect the outcome in other states. Yet, important as New York was, it would not be an easy state to carry. Both Robert Lansing and Robert Yates, New York's other two delegates at Philadelphia, had walked out of the Convention in protest, while Governor George Clinton organized the opposition at home. Unanimously elected president of the New York Ratifying Convention, Clinton would use his considerable influence inside the Convention and "out of doors" in an effort to defeat the proposed Constitution.

Because time was short, Hamilton enlisted the aid of fellow New Yorker, John Jay, in preparing the essays. Jay, though not a delegate to the Federal Convention, was a prominent New York statesman who had served as Secretary for Foreign Affairs under the Articles of Confederation. After several other possibilities had fallen through, Hamilton invited James Madison to join them. Madison, a leading force at the Convention, was now in New York as Virginia's representative to the Confederation Congress. Between October 1787 and May 1788, the three produced eighty-five essays under the title, *The Federalist*. It is now generally agreed that Hamilton wrote fifty-one papers, Madison twenty-six and Jay (owing to illness) five. The remaining three papers, tracing the history of past confederacies, are the joint collaboration of Madison and Hamilton.

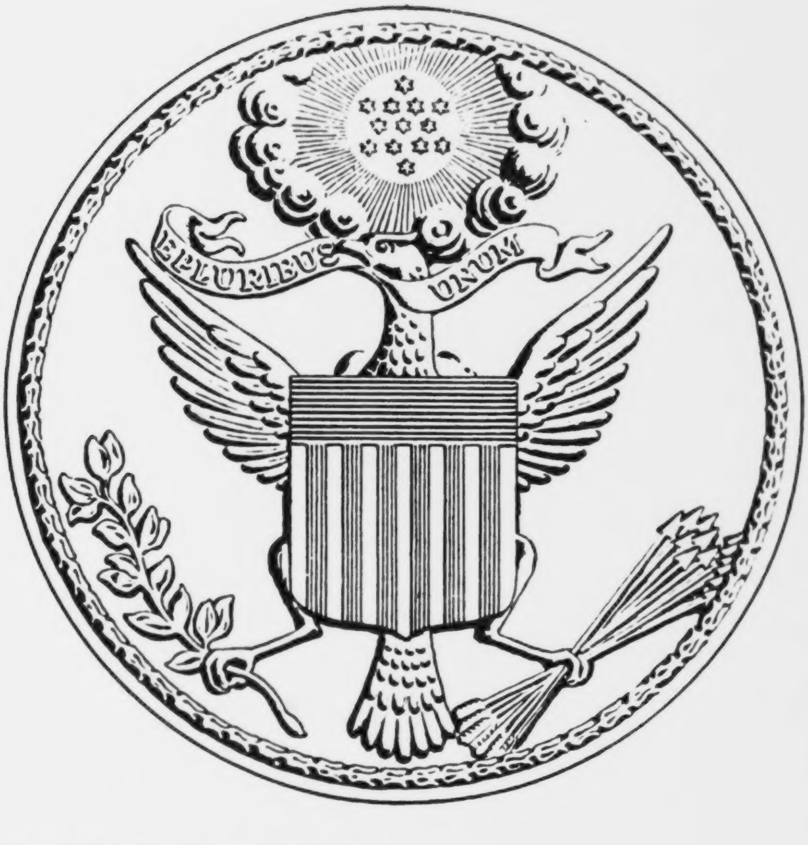
Following a common eighteenth-century practice, the authors did not reveal their identities but signed the papers under the pseudonyms, "Publius." Americans of that day recognized that the reference was to Publius Valerius Publicola, who, according to the account in Plutarch's *Lives*, had saved the Roman Republic. The choice of "Publius" suggested that, like their ancient namesake, the authors of *The Federalist* papers would save republicanism in America by reconstituting it on sounder principles.

Although *The Federalist* is the most important writing in American political thought, it is, more precisely, an exercise in political rhetoric than political philosophy. Unlike the great treatises of political philosophy by, say, Aristotle or Hobbes, Publius is not engaged in a disinterested pursuit of the truth. The authors of *The Federalist* do not explore such questions as "What are the proper ends of political life?" or "What form of government best promotes these ends?" Rather, they take as their starting point the principles set forth in the Declaration of Independence (which are themselves derived from Locke, the Scottish moral philosophers and others), that the purpose of government is to protect the natural rights of man. Moreover, their work is circumscribed by the knowledge that a republican government, organized on federal principles, is the only form of government Americans will accept. The purpose of *The Federalist*, then, is to persuade the people, by reason when possible and by appeals to passion and prejudice when necessary, that the Constitution establishes a republic, and that this republic is "sufficiently federal" to secure their rights.

But if *The Federalist* has a practical political agenda, it is by no means simply a tract for the times. Indeed, it is doubtful that *The Federalist* had much of an impact upon the ratification drive in New York. As the political scientist Clinton Rossiter has written: "Promises, threats, bargains and face to face debates, not eloquent words in even the most widely circulated newspapers, won hard-earned victories for the Constitution in the crucial states of Massachusetts, Virginia and New York." Ultimately *The Federalist's* claim to greatness lies in its authoritative exposition of the new Constitution and of the principles underlying it.

The Federalist's View of Human Nature: "If Men Were Angels . . ."

At the bottom of *The Federalist's* defense of the proposed Constitution is a view of human nature which may best be described as realistic. The authors of *The Federalist* rejected the popular Enlightenment view that man was basically good, and corrupted only from without by faulty institutions such as monarchy or mercantilism. Overthrow these institutions, it was widely believed, and men can live together in harmony with little or no government. Although Publius



The first Seal of the United States, 1782. Library of Congress.

agreed that these institutions were flawed, the authors of *The Federalist** held that the causes of human quarrelling could not be blamed simply on external conditions. The roots of discord and faction are "sown in the nature of man" (No. 10). Thus, in answer to the question, "Why has government been instituted at all?" Publius replied: "Because the passions of man will not conform to the dictates of reason and justice without restraint" (No. 15). Since no arrangement of the social order could ever make men good, government, with its ultimate threat of coercion, would always be necessary.

Americans, blessed by Providence with the most favorable external conditions (No. 2), must learn that man is no better in the New World than in the Old. Publius is one of the first to deny "the myth of American exceptionalism." Americans, he warns, have no claim to "an exemption from the imperfections, weaknesses, and evils incident to society in every shape" (No. 6). To believe otherwise is to indulge in "the deceitful dream of a golden age."

But if men are not good, neither does Publius regard them as simply evil. In one of the longest statements on human nature in *The Federalist*, Publius suggests that human nature partakes of both the admirable and the base and that republican government would be indefensible if men were simply degenerate.

> As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust: So there are *other qualities* in human nature, which justify a portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us, faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government, and that nothing less than the chains of despotism can restrain them from destroying and devouring one another (No. 55).

Yet although republican government "presupposes" a certain capacity for virtue, elsewhere in *The Federalist* Publius makes it clear that republican government cannot *rely* on morality for its preservation. All too often, these "better motives" fail just when they become most necessary. Moreover, the promotion of virtue by the national government would require a degree of political interference in private matters inconsistent with republican liberty.

Instead, *The Federalist* seeks to ground republican government on the most reliable aspect of human nature: self-interest. By self-interest, Publius means that most men, if left alone, will naturally seek to satisfy their own interests and desires, rather than look to the well being of the whole. In a society such as the one Publius hopes to shape, this means that most men will seek a comfortable material existence. Although some men will continue to pursue the more aristocratic desires for glory and power, Publius understands that the desire for material well-being is the mod-

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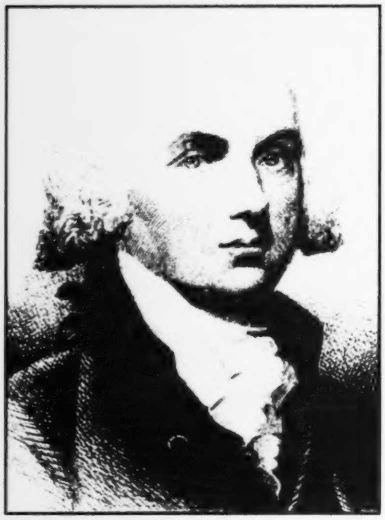
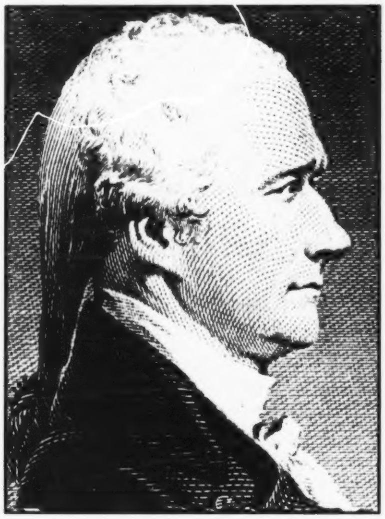
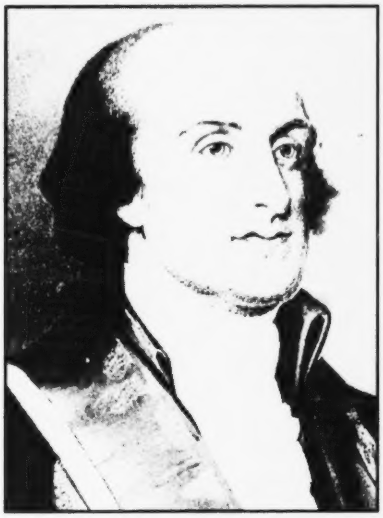
* *The Federalist* essays will be referred to by their numbers in parentheses after quotations.



James Madison. *Library of Congress.*



Alexander Hamilton. *Library of Congress.*



John Jay. *Library of Congress.*

ern democratic passion *par excellence.* Publius does not condemn any of these selfish impulses, or even try to moderate them. For *The Federalist* is confident that improvements and discoveries in "the new science of politics" (No. 9) will enable them to channel these desires toward the public good.

The Classical Republican Tradition and "the Extended Republic"

Chief among these discoveries is "the enlargement of the orbit" of republican government. Opponents of the Constitution, citing the authority of the French political philosopher Montesquieu, had insisted that republican government could not be expanded beyond the size of the states. Smallness was essential because it preserved a sense of community and made it possible for citizens to discern the common good. In an extended republic, the people would be too remote from the centers of power to participate in public affairs, and government would fall into the hands of private interests.

Publius responds in *Federalist* No. 9 by arguing that the states are far too large to meet the requirements of classical republicanism. Strict adherence to this principle would require that the states, too, be broken up into city-sized republics. Having demonstrated the inapplicability of the small republic argument to the Anti-Federalist cause, Publius then proceeds in *Federalist* No. 51 to turn the small republic argument on its head. In that paper, he argues that "the *larger* the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government." For *The Federalist* the chief danger to republican government comes not from the decline in civic virtue but, on the contrary, from the all too active involvement of the majority in schemes of oppression against the minority. According to Publius, the great advantage of the extended republic is that it permits majority rule while discouraging majority faction, or the tyranny of the many over the few. The minority Publius had in mind was principally the propertied few, but it applies with equal force to religious, racial and ethnic minorities.

The Extended Republic and "The Multiplicity of Sects and Interests"

This proposition, that a large republic is better able to protect liberty and hence to govern itself, rests on two premises. First, by extending the size of the country, the number of religious sects, political parties and economic interests would be so multiplied that no one group could force an unjust majority to oppress others. As Publius explains, in a large, pluralistic society, a coalition of the majority "could seldom take place on any other principles but justice and the general good." (No. 51). Here again, we note the crucial distinction between majority faction and majority rule.

But for social pluralism to work to maximum advantage, it is not enough simply to extend the sphere of republican government; the Constitution must encourage a large *commercial* republic. By commerce, Publius does not mean unrestricted laissez faire, for he regards "the regulation of these various and interfering [economic] interests" as "the principal tool of modern legislation." (No. 10). What *The Federalist* has in mind, very loosely, is a system of free enterprise, in which government policy and social mores encourage the people to acquire, possess, and most important, *increase* their property and wealth.

In its defense of a commercial republic, *The Federalist* challenges still another tenet of the republican creed. For the classical tradition eschewed commerce and insisted that its citizens remain poor so that nothing could distract them from their singleminded devotion to the common good.

Having substituted self-interest for virtue as the ground or "spring" of republican government, Publius is more sanguine about the prospect of a commercial republic. As he explains in *Federalist* No. 10, the cure for the evils of majority faction lies in the division of society into different *kinds* as well as amounts of property. Rich and poor must view each other not simply as opposing classes, but as members of different economic interests and occupations: creditors, debtors, *In one of the longest statements on human nature in* The Federalist, *Publius suggests that human nature partakes of both the admirable and the base and that republican government would be indefensible if men were simply degenerate.*

farmers, merchants, manufacturers, etc. Since only commerce can give this "variety and complexity to the affairs of a nation" (No. 56), Publius seeks to encourage a commercial republic.

"Inventions of Prudence": Representation and the Separation of Powers

The second reason that a large republic is more capable of self government is that it attracts more qualified representatives. In small republics, such as the states, representatives were drawn from smaller, more homogeneous constituencies and frequently did nothing more than mirror the "local and particular" views of the majority. By contrast, in the extended republic, electoral districts would necessarily be larger, increasing the likelihood that only the most "fit characters" would be elected. And once in office, these representatives would "refine and enlarge" rather than merely "reflect" their constituents' views. On the political level then, the advantage of the large republic consists in "the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice" (No. 10). Nevertheless, Publius does not believe the large republic *guarantees* the election of "enlightened statesmen." He recognizes full well that such leaders "will not always be at the helm." Thus an additional advantage of the large electoral district is that even if less qualified men are chosen, the sheer diversity of interests and opinions which they represent, as well as the necessity to compromise in order to obtain a legislative majority, will compel them to enlarge their views. So, by virtue of the "refined" representation which the large republic encourages, self government becomes good government. It is for this reason that Publius makes representation the *sine qua non* of republican government. Republican government is nothing more—and nothing less—than a government in which "a scheme of representation takes place" (No. 10).

If the extended republic makes possible a certain kind of representation, representation in turn makes possible the principle of separation of powers. In a pure democracy, where the people exercise all political power directly, no such division of legislative, executive and judicial powers is possible. Publius, citing Thomas Jefferson, regards the concentration of political power in the same hands as the very "definition of despotic government" (No. 48).

Publius does not claim to have discovered the separation of powers, but the Constitution does modify the principle significantly. Prior to 1787, the separation of powers was part of the theory of the mixed regime. According to this older view, which was given its fullest practical embodiment in the Roman Republic and later the British Constitution, political power was parcelled out to different hereditary classes in society. For example, in England, the monarch exercised executive power while the aristocracy and democracy shared legislative powers. By distributing political powers among these hereditary classes, the theorists of the mixed regime hoped to secure the benefits of monarchy, aristocracy and democracy while avoiding their defects.

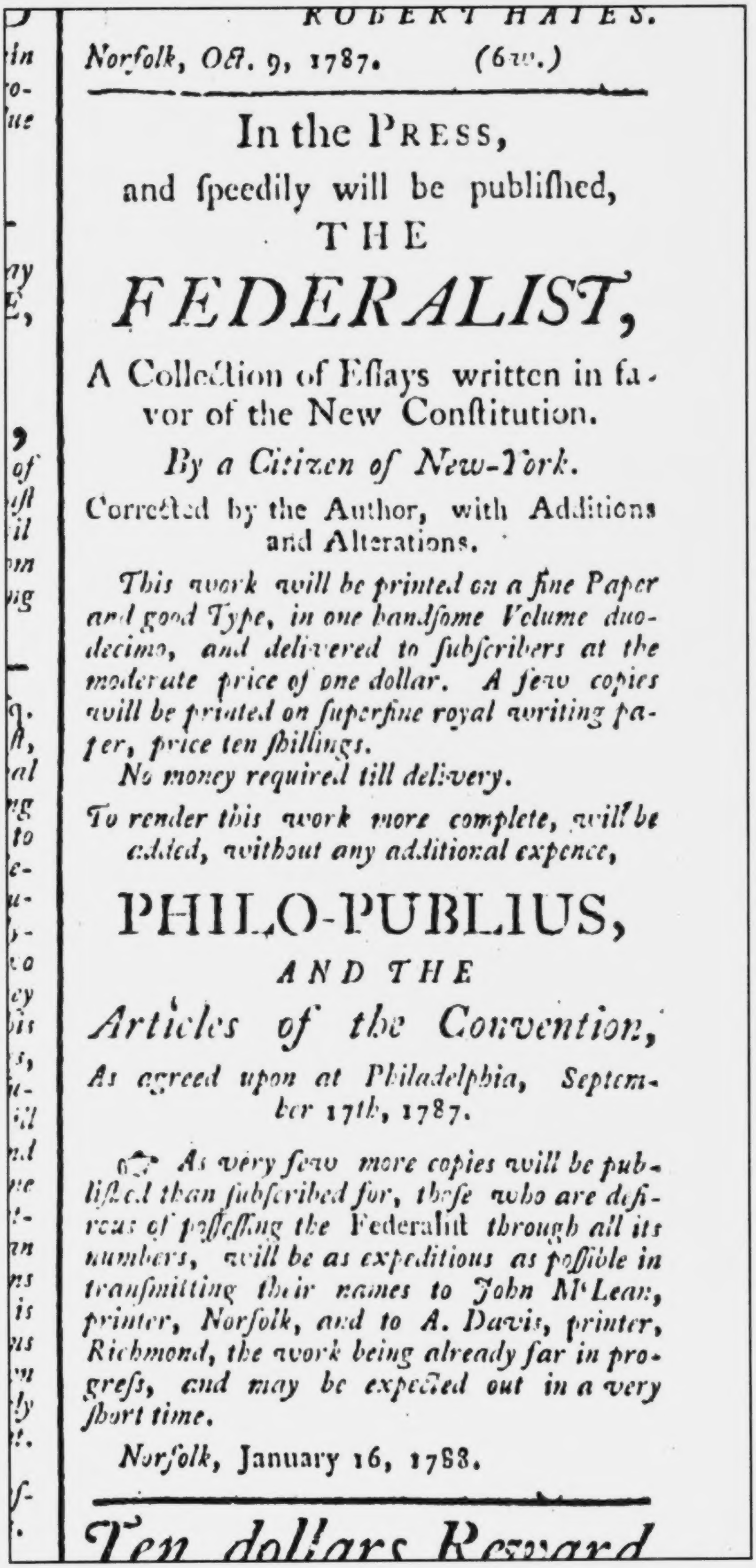
What makes the American Constitution unique is that it severs the separation of powers from the separation of classes or orders. Instead the Constitution establishes a democratic republic in which every branch of government—and not just the lower house of the legislature—represents the people. Within this wholly democratic framework, Publius hopes to secure the advantages of a mixed regime. As he explains in No. 37, by creating a single executive, independent of the legislature, the Constitution encourages energy and dispatch in that branch. Similarly, by reducing the size of the Senate and extending its term of office, the Constitution promotes certain other aristocratic qualities—stablity, wisdom, dignity—so often lacking in popular governments. In this way, the separation of powers by itself approximates the virtues of a mixed regime while remaining true to its republican form.

Still, the main purpose of the separation of powers is to prevent one branch from encroaching upon the powers of the others. According to Publius, the greatest danger to liberty in a "representative republic" comes not from the executive, but from the legislature. Because its constitutional powers are broader, and because it controls the raising and spending of money, the legislature stands in need of the greatest checks. "The provision for defense must . . . be made commensurate to the danger of attack" (No. 51). Accordingly, the Constitution divides legislative power between the two houses of Congress, each elected independently of the other and responsible to different (though democratic) constituencies. As a further precaution, the Constitution equips the executive with one-sixth of the legislative power through the veto. Finally, the Constitution encourages an independent judiciary to insure the impartial administration of the laws. By giving to each branch "the necessary constitutional means, and personal motives to resist the encroachments of the others" (No. 51), the Constitution puts teeth into the principle of separation of powers. Here again, Publius reiterates his view that the Constitution cannot rely primarily upon the "better motives" of moral and patriotic leaders to maintain the proper separation of powers, but must appeal instead to each individual's self interest. In perhaps the most famous passage of *The Federalist*, Publius connects the separation of powers with his realistic view of man:

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary (No. 51).

The Compound Republic: "Partly Federal, Partly National"

The Constitution not only divides power horizontally among the three different branches of government, it also divides power vertically between the federal government and the states. This vertical distribution—or federalism—in which power is constitutionally distributed between two levels of government, each of which is supreme in its own sphere, is the most novel of the Framers' inventions. Prior to 1787, federalism was synonymous with confederalism. Federalism in this more traditional sense referred to a league of small republics, united for limited security purposes.



ROBERT HAYES.

Norfolk, Oct. 9, 1787. (6w.)

In the PRESS,
and ſpeedily will be publiſhed,
THE
FEDERALIST,
A Collection of Eſſays written in favor of the New Conſtitution.
By a Citizen of New-York.
Corrected by the Author, with Additions and Alterations.

This work will be printed on a fine Paper and good Type, in one handſome Volume duodecimo, and delivered to ſubſcribers at the moderate price of one dollar. A few copies will be printed on ſuperfine royal writing paper, price ten ſhillings.

No money required till delivery.

To render this work more complete, will be added, without any additional expence,

PHILO-PUBLIUS,
AND THE
Articles of the Convention,
As agreed upon at Philadelphia, September 17th, 1787.

☞ *As very few more copies will be publiſhed than ſubſcribed for, theſe who are deſirous of poſſeſſing the* Federaliſt *through all its numbers, will be as expeditious as poſſible in tranſmitting their names to John M'Lean, printer, Norfolk, and to A. Davis, printer, Richmond, the work being already far in progreſs, and may be expected out in a very ſhort time.*

Norfolk, January 16, 1788.

Ten dollars Reward

Advertisement for The Federalist *in book form, published in The Virginia Independent Chronicle,* 13 February 1788. Library of Congress.

Though written in haste, under the pressure of editorial deadlines, The Federalist *was from the outset regarded as the most authoritative explication of the principles underlying the Constitution.*

The states retained full sovereignty over their internal affairs and were represented equally in the federal alliance. Confederalism was a vital component of the small republic tradition, according to which only the state governments could preserve republican liberty.

But in 1787, a new generation of Americans, having witnessed firsthand the defects of state sovereignty under the Articles of Confederation became convinced a modification of the traditional federal principle was necessary if liberty was to be secure. Accordingly, the new federal principle invented at the Constitutional Convention forms a mean between confederation based on state sovereignty and a consolidated central government based on national sovereignty. The Constitution, Publius concedes, is "partly federal, partly national" (No. 39).

But is it "sufficiently federal" to preserve the republican liberty? In *Federalist* No. 39, Publius examines the new government from five different perspectives—its foundation, sources of power, operation and extent of powers, and the amendment process—to convince his critics that it is "sufficiently federal." His discussion makes it clear the extent to which federalism—in its contemporary meaning—suffuses the political order.

Starting with the amendment process, Publius argues that the foundation of government is a federal act since the Constitution rests on the unanimous consent of the people in the states. No state can be compelled to join the Union without its consent.

Considering next the sources from which the ordinary branches of government are derived, Publius concludes that they are mixed. The House of Representatives is national because it represents the people and not the states. On the other hand, the Senate, especially as originally conceived, is the most "federal" branch, since it represents each state equally regardless of its size or population. Because the president is chosen by the Electoral College, rather than by direct popular vote, Publius regards the source of executive powers as essentially federal. Indeed, it is worth noting that, even today, there is no federal office which is elected by a simple majority of the people as a whole.

Turning next to the operation of the new government, Publius concedes it is unambiguously national. The federal government will have the power to legislate directly over individuals. Publius regards this provision as essential, for the government would not *be* a government if it lacked the power to legislate and enforce its decisions.

The amending power Publius considers partly federal and partly national. Although the states have the power to alter the Constitution, the amendment process does not, as traditional federal theory would have it, require the unanimous consent of the states. By contrast with the ratification process, the sovereignty of the dissenting states is here breached.

Finally, "perhaps most importantly, federalism provides some check" upon the extent of national powers. Since the federal government is "an incomplete" national government, the states are necessary to perform those tasks which it is inconvenient or undesirable for the federal government to perform. The federal principle holds that the absorption of these powers by the federal government would dangerously concentrate political power.

It is true that the Constitution does not explicitly enumerate which powers are reserved to the states. For this reason, the division between state and federal jurisdiction has been more a political than a constitutional issue. Nevertheless, modern federalism preserves, however loosely, the division of power necessary for republican liberty. In this way, it accords with the central theme of *The Federalist*, that liberty is best preserved not by limiting political power, but by properly distributing it.

Conclusion

Although the immediate aim of *The Federalist* was to secure the ratification of the Constitution in New York, it remains unclear how successful the papers were in achieving this goal. On June 21, 1788, while the New York Ratifying Convention was just beginning its deliberations, New Hampshire became the ninth state to ratify the Constitution. Shortly thereafter, Virginia voted to join the Union, and on July 26, 1788, with the new Constitution already a certainty, New York followed suit.

But the enduring claim of *The Federalist* does not rest primarily on its role in securing ratification. Though written in haste, under the pressure of editorial deadlines, *The Federalist* was from the outset regarded as the most authoritative explication of the principles underlying the Constitution. And two hundred years later, there is no reason to revise this view.

Suggested additional reading:

David F. Epstein, *The Political Theory of "The Federalist"* (1986).

Clinton Rossiter, ed. *Federalist Papers* (1986).

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The Constitutional Thought of the Anti-Federalists

by MURRAY DRY

Although they claimed to be the true federalists and the true republicans, the men who opposed the Constitution's unconditional ratification in 1787–1788 were called Anti-Federalists. The leading opponents from the major states included Patrick Henry, George Mason, and Richard Henry Lee from Virginia, George Clinton, Robert Yates, and Melanchton Smith from New York, John Winthrop and Elbridge Gerry from Massachusetts and Robert Whitehill, William Findley, and John Smilie from Pennsylvania. They all agreed that the document produced by the Convention in Philadelphia was unacceptable without some amendments. Since most state constitutions contained bills of rights, the need for a similar feature for the national constitution formed the Anti-Federalists' most effective argument against unconditional ratification. The national Bill of Rights is the result of that dialogue.

Nevertheless, the Anti-Federalists' major contribution to the American founding lay more in their critical examination of the new form of federalism and the new form of republican government than in their successful campaign for a bill of rights. The Anti-Federalists sought substantial restrictions on federal power, which the amendments subsequently adopted did not provide. Suspicious of a strong national government, these opponents nevertheless failed to agree on an alternative constitutional arrangement. Still, the legacy of the Anti-Federalists persists in our constitutional debates over federalism and republican government.

Anti-Federal constitutionalism finds its most thoughtful and comprehensive expression in the *Letters of the Federal Farmer* and the *Essays of Brutus*, attributed to Richard Henry Lee and Robert Yates, respectively. Although authorship remains uncertain, these writers covered all major constitutional questions in a manner that required, and received, the attention of "Publius," the penname adopted by Alexander Hamilton, James Madison, and John Jay, authors of the famous *Federalist* papers.

This essay will discuss Anti-Federal constitutionalism in three parts: federalism; the separation of powers; and the bill of rights.

Republican Government and Federalism

The Anti-Federalists claimed to be the true federalists because they were the true republicans. Consequently, we begin with their account of republican government and its relation to federalism.

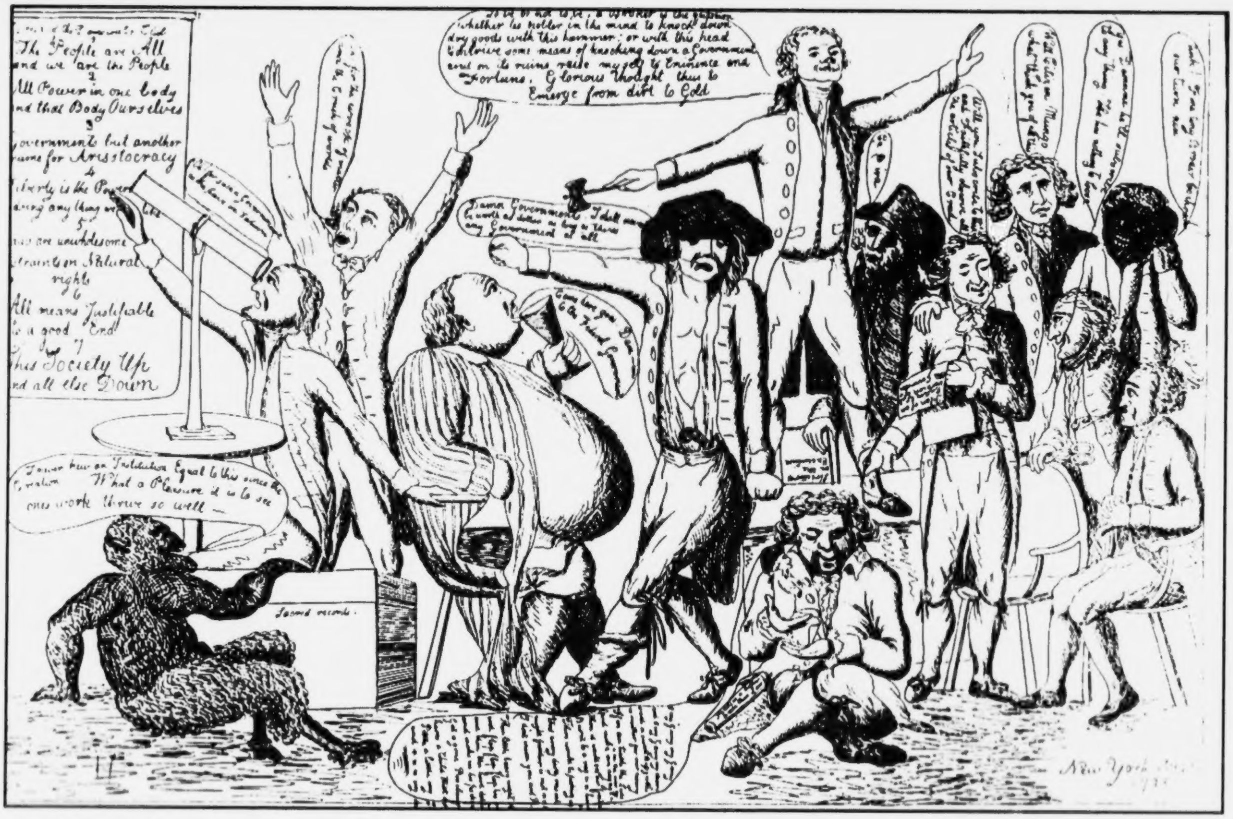
The Anti-Federalists believed that to maintain the spirit of republican government, which was the best defense against tyranny, individuals needed to know one another, be familiar with their governments, and have some direct experience in government. Only then would the citizenry possess a genuine love of country, which is the essence of republican, or civic, virtue.

The Anti-Federalists espoused the then traditional view of republican government, reflected in the first state constitutions, which emphasized the legislative branch of government. With the first federal constitution, the Articles of Confederation, the states, through their legislatures, retained effective control of federal men and federal measures. The delegates to Congress were chosen by the state legislatures and were subject to being recalled. The federal power to raise taxes and armies not only required a vote of nine states, but, even after such a vote, it depended on state requisitions, which meant that the federal government depended on the good will of the states to execute the law.

In stark contrast, the Constitution proposed by the Federal Convention in 1787 provided the basis for a strong national government. Elections to the House of Representatives were by the people directly, not the states, and the federal powers over taxes and the raising of armies were completely independent of the state governments. This new form of federalism necessarily produced a new form of republicanism, the "large republic." Furthermore, Publius did not shrink from providing a positive argument in support of it." *Federalist* 10 justified the new form of republicanism, not only as the price of union but as the republican remedy to the disease of majority faction, or majority tyranny.

Because the Federalists saw a major danger not from the aggrandizing of the ruling few, but from the tyranny of the majority, they sought to restrain the influence of that majority in order to secure individual rights and the permanent and aggregate interests of the community. Such restraint was to be achieved through a large extended sphere, i.e. the constituencies of the federal government. These would be larger and more diverse than the constituencies of the states, and so would make majority tyranny more difficult, since more negotiation and compromise would be needed for any single faction to become part of a majority. In addition, the increased competition for office would produce better representatives and a more effective administration throughout the government.

Perhaps because he took republican government for granted, as a given in America, Publius under-


1
The People are All
and we are the People
2
All Power in one body
and that Body Ourselves
3
overnments but another
ame for Arisstocracy
4
iberty is the Power
doing any thing we like
5
are unwholesome
straints on Natural
rights
6
All means Justifiable
to a good End
7
This Society Up
and all else Down
whether tis nobler in the mind to knock down dry goods with this hammer; or with this head to devise some means of knocking down a Government and on its ruins raise myself to Eminence and Fortune. Glorious thought thus to Emerge from dirt to Gold
Damn Governments I doll... any Government at all
I never knew an Institution Equal to this since the Creation What a Pleasure it is to see ones work thrive so well —
Secret records.
New York

A Peep into the Antifederal Club, *a 1793 cartoon ridiculing the Anti-Federalists. The Library Company of Philadelphia.*

stood it to require only that offices of government be filled directly or indirectly by popular vote. Furthermore, the representation of the people was satisfied by the fact of election, regardless of the contrast between the wealth and influence of the elected and the electorate.

To the Anti-Federalists, the people would not be free for long if all they could do was vote for a representative whom they would not know and who would be very different from them.

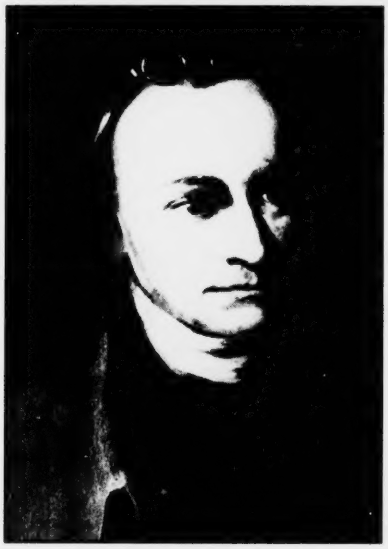
Because the Anti-Federalists emphasized participation in government, they argued that a small territory and a basically homogeneous population were necessary for a notion of the "public good" to be agreed upon. The Anti-Federalists did not insist that every citizen exercise legislative power. But they did emphasize representation of the people in the legislatures and on juries. By "representation" they meant that the number of people in a legislative district must be small enough and the number of districts large enough so that the citizens will know the people they are voting for and be able to elect one of their own—one of the "middling class." This latter phrase referred to the large number of farmers of modest means. A substantial representation of this agricultural middle class was possible even in the large states and necessary for the character of the governors to reflect the governed. Under the proposed constitution, argued the Anti-Federalists, this kind of representation would be impossible at the federal level, where the districts would contain at least 30,000 people.

Likewise, by participating in local jury trials, in civil as well as criminal cases, the people in their states acquired a knowledge of the laws and the operation of government, and thereby, argued the Anti-Federalists, they become more responsible citizens. It was feared that this responsibility would be lost when cases were appealed to the proposed national supreme court, which had jurisdiction on appeal over all questions of law and fact.

Since the Anti-Federalists believed that republican government was possible in the states but not in one single government for the entire country, only a confederacy, that is, a federal republic, could safeguard the nation's freedom. They understood such a form of government to have a limited purpose, primarily common defense. Hence, those who became Anti-Federalists originally favored limited amendments to the Articles of Confederation, rather than an entirely new constitution. When a new constitution became inevitable, they hoped to limit the transfer of political power from the states to the national government. They claimed to be the true republicans and the true federalists because they understood republican government to require a closely knit people attached to their government. They sought to grant only so much power to the federal government as was absolutely necessary to provide for defense. In this way, the distribution of governmental power, as between the nation and the states, would correspond to the distribution of representation. And while the Anti-Federalists did argue for an increase in the federal representation, that by itself would not have satisfied the requirement of republican government, as they saw it, since the people would always be more substantially represented in their state governments. According to the Anti-Federalists, the Federalists were not federalists but consolidationists; and the ultimate effect of the Constitution would be to reduce the states to mere administrative units, thereby eliminating republican liberty.

Federalism and the Constitution: The Legislative Powers

Already fearful of the Constitution's threat to republican liberty, the Anti-Federalists vehemently objected to the large number of specific powers granted to Congress, especially the taxing power and the power to raise armies. They found the undefined grants of power in the "necessary and proper" and the "supremacy" clauses (I,8,18 and VI,2) alarming as well. The government, Brutus claimed, "so far as it extends, is a complete one, and not a confederation," and "all that is reserved to the states must very soon be annihilated, except so far as they are barely necessary to the organization of the general government." With the power to tax virtually unchecked, Brutus lamented that "the idea of confederation is totally lost, and that of one entire republic is embraced." The Anti-Federalists attempted to draw a line between federal and state powers, conceding to the federal government only those powers which were necessary for security and defense. Their most common tax proposal would have limited the federal government to a tax on foreign imports, leaving internal taxes, both on individuals and on commodities, to the states. This limitation would guarantee the states a source of revenue out of reach of the national government. If this federal tax source proved insufficient, the Anti-Federalists proposed turning to the states for requisitions, as was the case under the Articles of Confederation.



Patrick Henry. *Collection of the Architect of the Capitol. Library of Congress.*

Brutus warned, as well, that the power "to raise and support armies at pleasure . . . tend[s] not only to a consolidation of the government, but the destruction of liberty." The Anti-Federalists generally took the position that there should be no standing armies in time of peace. Brutus proposed a limited power to raise armies to defend frontier posts and guard arsenals to respond to threats of attack or invasion. Otherwise, he maintained, standing armies should only be raised on the vote of two-thirds of both houses.

Publius' rejection of this position was complete and uncompromising. The "radical vice" of the Confederation had been precisely the dependence of the federal power on the states. The universal axiom that the means must be proportional to the end required that the national government's powers be adequate to the preservation of the union. (*Federalist* 15,23)

The Separation of Powers and Republican Government

The separation of powers refers primarily to the division of power among the legislative, executive, and judicial branches of government, but it also includes bicameralism, or the division of the legislature into a house of representatives and a senate. In this part, we begin with the Anti-Federalists' general approach to the separation of powers, which will be followed by accounts of their views on the senate, the presidency, and the judiciary.

The Anti-Federalists attacked the Constitution's separation of powers from two different perspectives. Some, such as Centinel (a Pennsylvania Anti-Federalist), alleged that there was too much mixing and not enough separation; others, like Patrick Henry and the Maryland Farmer, asserted that there were no genuine "checks" at all. The first position opposed the special powers given to the senate and the executive. The second argued that a true separation of powers depended upon social divisions not available in the United States, such as an hereditary nobility as distinct from the common people. The English Constitution drew on such divisions; social class checked social class in a bicameral legislature, and each was checked, in turn, by an hereditary monarch. While the Federalists celebrated the filling of all offices by election directly or indirectly, some Anti-Federalists, including Patrick Henry, argued that such elections would result in the domination of the natural, or elected, aristocracy in all branches of government, not a true "checks and balances" system.

The Senate

The Anti-Federalists feared that an aristocracy would emerge from the senate, taking more than its share of power. A small number of individuals, elected by the state legislatures for six years, and eligible for reelection, shared in the appointment and treaty-making powers with the executive, as well as in the law-making process with the house of representatives. In order to prevent senators from becoming an entrenched aristocracy, the Anti-

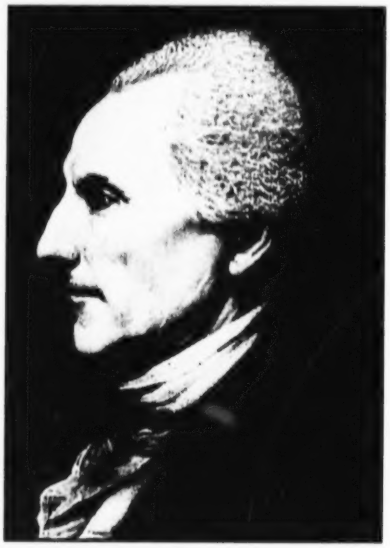
Federalists favored an amendment requiring rotation in office and permitting recall votes by the state legislatures. They also favored a separately elected executive council, which would have relieved the senate of its share in the appointment power. None of these proposals was adopted.

The Executive

Anti-Federal opposition to the office of president was surprisingly limited. While Patrick Henry asserted that the constitution "squints toward monarchy," most of the Anti-Federalists accepted the unitary office and the "electoral college" mode of election.

The eligibility of the president to run repeatedly for office, however, did provoke substantial opposition, as did the absence of a special executive council, which would have shared the appointment power. Whereas Publius had argued that re-eligibility provides a constructive use for ambition, Federal Farmer replied that once elected a man will spend all his time and exercise all his influence to stay in office. The executive council would have weakened the power of the Senate, which concerned the Anti-Federalists even more than the president's power.

No Anti-Federalist expressed concern about the general phrase "the executive power," perhaps because it was unclear whether this was a grant of power or merely the name of the office. Some questioned the "commander-in-chief" clause, the pardoning power, and the authority to call either of both houses into special session. But in light of the difficulties of governing without an independent executive, which the country experienced under the Articles of Confederation, and the common expectation that George Washington would become the first president, the Anti-Federalists let their objections go.



Richard Henry Lee. *Independence National Historical Park.*

The Judiciary

While many Anti-Federalists failed to discuss it, Brutus' account of the judicial power anticipated the full development of judicial review as well as the importance of the judicial branch as a vehicle for the development of the federal government's powers, both of which he opposed. By extending the judicial power "to all cases, in law and equity, arising under this Constitution," Article III permitted the courts "to give the constitution a legal construction." Moreover, extending the judicial power to equity as well as law (a division made originally in English law) gave the courts power "to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." Hence, Brutus concluded that "the real effect of this system will therefore be brought home to the feelings of the people through the medium of the judicial power."

Under the judicial power, the courts would be able to expand powers of the legislature and interpret laws in a way Congress did not intend. Brutus interpreted the grant of judicial power to all cases arising under the Constitution as a grant of "judicial review." He opposed this grant, because he thought the judges, who were appointed for life, should leave it to Congress to interpret the constitutional reach of its powers. That way, if Congress misinterpreted the Constitution by overextending its powers, the people could repair the damages at the next election. Brutus approved of the framers' decision, following the English Constitution, to make the judges independent by providing them with a lifetime appointment, subject to impeachment, and fixed salaries. But he pointed out that the English judges were nonetheless subject to revision by the House of Lords, on appeal, and to revision, in their interpretation of the constitution, by Parliament. Extending the judicial power to the American Constitution meant that there would be no appeal beyond the independent non-elected judiciary. Brutus did not think that impeachment for high crimes and misdemeanors would become an effective check, and while he did not mention it, he doubtless would have regarded the amendment process also as unsatisfactory.

Anti-Federalists including Brutus objected as well to the extensive appellate jurisdiction of the supreme court. Article III section 2 may have guaranteed a jury trial in criminal cases, but on appeal, the fate of the defendant would be up to the judges. The Anti-Federalists wanted to have the right of jury trials extended to civil cases and to have the results protected against appellate reconsideration.

Finally, Brutus objected to the "Madisonian compromise," which authorized, but did not require, Congress to "ordain and establish" lower courts. Except for the limited grant of original jurisdiction in the supreme court, judicial power, the Anti-Federalists argued, should have been left to originate in the state courts.

The Anti-Federalists are best known for the Bill of Rights, since the Constitution would not have been ratified without the promise to add it. But the Bill of Rights was as much a Federalist as an Anti-Federalist achievement.

The Bill of Rights

The Anti-Federalists are best known for the Bill of Rights, since the Constitution would not have been ratified without the promise to add it. But the Bill of Rights was as much a Federalist as an Anti-Federalist achievement. The Anti-Federalists wanted a bill of rights to curb the power of the national government to intrude upon state power; the Bill of Rights, as adopted, did not address this question. Instead, it limited the right of government to interfere with individuals, and, as such, included provisions similar to those in the bills of rights in many of the state constitutions.

When the Federalists denied the necessity of a federal bill of rights, on the grounds that whatever power was not enumerated could not be claimed, the Anti-Federalists pointed to the Constitution's supremacy and to the extensiveness of the enumerated powers to argue that there were no effective limitations on federal authority with respect to the states. None of the actual amendments, which were written up and guided through the House by Madison, followed the Anti-Federal proposals to restrict federal powers, especially the tax and war powers. As for what became the tenth amendment, Madison himself said that it simply clarified the existing enumeration of powers but changed nothing. Furthermore, when an Anti-Federalist tried to get the adverb "expressly" inserted before "delegated" in the amendment—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"—his motion failed by a substantial margin.

The Anti-Federalists' demand for a bill of rights derived from their understanding of republican government. Such a form of government was mild in its operation and a public proclamation of their rights kept the people aware of them. Consequently, the Bill of Rights, even in its Federalist form, reflects Anti-Federal constitutionalism. But the amendments did not restrict the major federal powers, over taxes, commerce, and war, or in any way limit implied powers. Furthermore, as Jefferson noted, in a letter he wrote to Madison in 1789, by emphasizing individual rights, the Bill of Rights put a legal check in the hands of the judiciary. In other words, before he opposed the power of judicial review, Jefferson seemed to take its existence for granted. He argued that writing a bill of rights into the Constitution would provide judicial protection of those rights. Neither Jefferson nor the Anti-Federalists seemed to realize how a federal bill of rights, by strengthening the federal courts, would thus serve to strengthen Federalist constitutionalism.

Conclusion

The Anti-Federalists lost the ratification debate because they failed to present a clear and convincing account of a constitutional plan that stood between the Articles of Confederation, which they acknowledged was unable to provide for the requirements of union, and the Constitution proposed by the Federal Convention, which they feared would produce a consolidation of power. And yet the periodic and contemporary constitutional debates over federalism, over the extent of legislative and executive power, and over individual rights and judicial review reflect the different conceptions of republican government that were developed in the founding dialogue over the Constitution.

Any strict construction of federal power has much in common with Anti-Federalist constitutionalism. During the founding debate, opponents of a strong national government wanted to amend the Constitution; after ratification, Anti-Federalists had no choice but to interpret the Constitution to require limited federal government. The contemporary controversies over abortion, pornography, and sexual practices among consenting adults, and the issues surrounding the religion clauses of the First Amendment reveal disagreements over the scope of individual rights, on the one hand, and the legitimacy of government maintenance of community manners and morals on the other. These controversies resemble the founding debate over republicanism, where the Federalists focused on the security of individual rights and the Anti-Federalists expressed a greater concern for the character of republican citizenship, maintained in part through religion. Through such debates, Anti-Federal constitutionalism, as applied to governmental structure and to moral qualities necessary for free government, thus remains an important part of our constitutional polity.

Suggested additional reading:

Herbert J. Storing, *What the Anti-Federalists were For* (1981).

Herbert J. Storing (with Murray Dry), *The Anti-Federalist* (1985).

Murray Dry, "The Case Against Ratification: Anti-Federalist Constitutional Thought," in Dennis Mahoney, ed., *Essays on the Ratification of the Constitution* (1987).

Gordon Wood, *The Creation of the American Republic, 1776–1787* (1969).

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The Constitution as Myth and Symbol

by MILTON M. KLEIN

The United States Constitution is and always has been a political symbol as well as a political document. Like the American flag and the national anthem, the Constitution expresses ideas of patriotism, nationalism, and freedom. Unlike the flag and the anthem, the Constitution also connotes the rule of law and the superiority of higher law over legislative and executive actions. It thus confers a stamp of legitimacy upon public and private behavior that has few counterparts in other countries.

As a symbol, the Constitution's appeal has been broad and multifaceted. Historians like John Fiske celebrated the document as "this wonderful work,—this Iliad, or Parthenon, or Fifth Symphony, of statesmanship." European statesmen like William Gladstone celebrated it as "the most wonderful work ever struck off at a given time by the brain and purpose of man"; and American statesmen like Andrew Johnson paid ther homage to the document in his wish: "When I die, I desire no better winding sheet than the Stars and Stripes, and no softer pillow than the Constitution of my country."

There is no necessary correlation between the symbolic and the substantive meaning which the American public attaches to its objects of civil worship. Thus, while the nation paid near-universal tribute on July 4, 1986, to the Statue of Liberty as the symbolic representation of the "Golden Door" and of America as a land of freedom and opportunity for newcomers to our shores, a CBS-*New York Times* poll, at the same time, disclosed that a plurality of those questioned believed we should be more restrictive in our immigration policies.

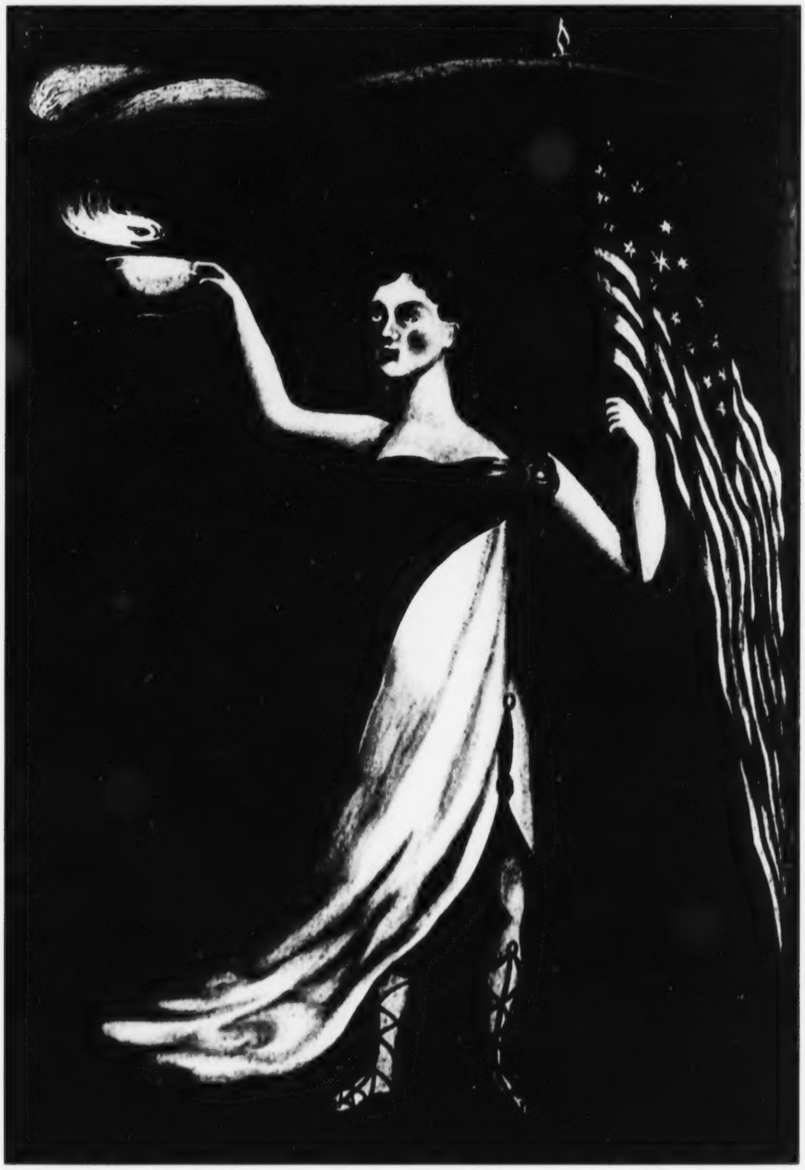
Symbols do, however, play an important role in American political culture, perhaps more so than in others. All political systems require a sense of personal identification between the individual citizen and the political system and a sense of identification among individuals within the system. In the United States, the creation of such a sense of national identity was inhibited by the absence of a long history of nationhood or the existence of bonds like a monarchy, an aristocracy, an established religion, or a common intellectual culture. While there is evidence of an emergent sense of American nationhood even before the Revolution, the prevailing sentiment of Americans was probably more like that of the New Englander who during the Revolution declared that his affections flowed in what he called their "natural order": "toward Salem,—Massachusetts,—New England,—the Union at large."

While the Constitution did not in itself create an American nationalism, it provided an extraordinarily influential symbol of national identity; and symbols are powerful ingredients in the creation of a political culture. Symbols supply an overarching sense of unity in societies that might otherwise be riddled with conflict. They evoke, as illusion or reality, the implicit principles by which a society lives; they are visible signs of an often invisible belief; they simplify and emotionalize loyalties; and they require no formal proof. What they stand for may be only partly true, or not true at all, but for those who accept them, symbols are as real and objectively verifiable as the Rock of Gibraltar. In politics, symbols serve to link the individual to the larger political order, to synchronize the diverse motivations of different individuals, and to make possible collective action. They become the "currency" of political communication. One political scientist goes so far as to insist that for most of us, "politics is . . . a passing parade of abstract symbols," and Max Lerner suggests that unless a government is naive enough to rely solely on rational appeals or brutal enough to resort to coercion, it will employ symbols to enlist group loyalty.

Symbols are vehicles for myth-making, and the myth of the Constitution early augmented that document's symbolic importance. Anthropologists define myths as tales and traditions which people develop to create and reinforce social order. Like symbols, myths provide societies with coherence and direction, putting new experiences into familiar contexts. Myths strengthen tradition and endow it with greater value and prestige by tracing it back to a higher and better source. With symbols, they give a political order a sense of purpose. Political myths and political symbols are mutually supporting and reinforcing.

"Cult of the Constitution"

The events surrounding the birth of the American republic were not particularly conducive to the creation of national symbols, but the new nation shortly created three icons: George Washington, the Stars and Stripes, and the Declaration of Independence. None of these provided underpinnings for a particular political order, since the government of the United States for the first decade of its existence rested on the tenuous foundation, first, of an informal agreement by which the Continental Congress served as a limited national government and, then, of the short-lived Articles of Confederation. The Constitution provided a more solid foundation, and its framers early began to surround it with the mythology it required as the symbol of



"Liberty," a primitive painting adapted from Edward Savage, **Liberty in the form of the Goddess of Youth, giving support to the Bald Eagle,** *1796. Garbisch Collection, National Gallery of Art, Washington, D.C.*

the new political order.

The creation of a "cult of the Constitution" began with the Federalists who wrote the document and fought for its ratification. The philosophical basis for the myth was both religious and secular. Jefferson described the Framers as "demi-gods" and the document itself as the "ark of our safety." The words "ark" and "covenant" were invoked frequently by those who, in speech and writing, worked to enlist emotional support for the country's new fundamental charter. The Olympian gathering of virtuous men performing a "miracle" at Philadelphia could only be likened to a supernatural event. The Constitution itself was compared to Scripture, and the Supreme Court, in time, became the temple that incarnates the sacred document

There is also a secular foundation for the cult of the Constitution. The colonists, in their contest with Britain, steadily insisted that Parliamentary actions violated a "constitution" which governed relations between colonies and mother country and which implicitly reserved a sphere of internal autonomy for them within the broader imperial context. Resorting to their own provincial manifestations of this imperial constitution, individual colonies insisted that the fundamental law governing their relations with the mother country was fixed and immutable, invulnerable to Parliamentary legislation and the acts of British sovereigns or their viceroys in the colonies. There were basic legal rights, several New York lawyers argued as early as 1754, that were "interwoven with and part of the Political Frame and Constitution of the Province" and that could not be arbitrarily abridged or abrogated. They repeated the claim ten years later, when they charged the province's lieutenant governor with responsibility for tampering with the traditional right to trial by jury:

> Is a constitution matured by ages, founded as it were on a rock, repeatedly defended against lawless encroachments by oceans of blood, meliorated by the experiences of centuries, alike salutary to princes and people, and guarded by the most awful sanctions: is such a constitution . . . now to be altered or abolished, by—the dash of a pen?

By the eve of the Revolution, the idea was widespread in the colonies that constitutions were not merely descriptions of how governments operated but rather fundamental charters, anterior to statutory law and the source from which both legislatures and executives drew their authority. Further, constitutions were held to possess a special role in the preservation of liberty, since they guaranteed from governmental interference those rights which individuals possessed in nature. Conservative patriots, in the end, could justify an act of revolution precisely because, they insisted, they were the true conservators of both the British and the colonial constitutions; the British were the innovators and the real revolutionaries!

For those Americans who accept-

Conservative patriots, in the end, could justify an act of revolution precisely because, they insisted, they were the true conservators of both the British and the colonial constitutions; the British were the innovators and the real revolutionaries!

ed the Lockean theory of the origin of government, there was still another ground for their respect for constitutions. A constitution represented the civil contract by which societies had been formed. The idea of the inviolability of compacts was one of the most persistent arguments employed by colonials in their legal confrontation with Parliament before the Revolution. Their relationship with Britain, they contended, was founded on an original compact between the first settlers and the Crown. The compact prescribed mutual obligations and responsibilities: the settlers agreed to establish colonies in a wild continent for England's political and economic benefit; the Crown, in turn, undertook to nurture and protect the colonies and to guarantee the settlers the same personal liberties they had possessed while in England. Independence was, then, justified, as a recognition that the Crown had broken the compact, leaving the colonists legally free to pursue their own destiny as sovereign states.

Constitutions and compacts were the high ground on which the colonists sought to justify their rebellion "out of a decent respect to the opinions" of an incredulous eighteenth-century world, and the success of that rebellion gave constitutions a hallowed place in the pantheon of American political icons. The Constitution of 1787 thus began its existence with a veneration already engendered by a long colonial and Revolutionary history.

Ratification

None of this is to imply that the Constitution did not require careful cultivation by its earliest supporters in order for it to assume the symbolic power it came to possess. It could hardly have been an automatic symbol of unity given the limited number of persons who were involved in its making and ratification and the violent debate over its acceptance. Anti-Federalists, of course, denounced it as an instrument of centralization, authoritarianism, aristocracy, and even godlessness, and epigrammatized it as a "thirteen-horned monster," a "spurious brat," and a "heterogeneous phantom." Federalists, on the other hand, employed the rhetoric of national unity almost from the start to counter the divisiveness aroused by the Constitution's critics. In *The Federalist* papers, its authors expressed the hope that the Constitution would draw upon itself "that veneration which time bestows on everything, and without which perhaps the wisest and freest of governments" would lack stability; but supporters of the new charter of government were not content to allow time to do its work unaided. A rhetoric and a ritual of national unity were created to supply what ordinary circumstances might not.

While Anti-Federalists in 1788 insisted that the nation wanted no new constitution, the popular mood was better reflected in the sentiments of James Sullivan, a Massachusetts Anti-Federalist turned Federalist: he surmised that people expected so much from the Philadelphia convention that they would be ready to accept almost anything it offered. The outpouring of popular celebrations of the inception of the new government, even before ratification was formally secured in some states, seemed to bear out Sullivan's prediction. New York City's festivities were held three days before the Poughkeepsie Convention approved the new Constitution on behalf of the State of New York. Federalists in New York City orchestrated a huge "Federal Procession." It began in the morning and did not end until 5:30 p.m. Almost one quarter of the city's population were in the mile-and-a-half parade. Every trade and profession was represented among the marchers, and each carried distinctive banners or mounted special displays: a federal loaf by the bakers, a 300-gallon ale cask by the brewers; and a federal ship by the pilots and mariners. The theme was unity and prosperity, and banners carried the words in undistinguished but unmistakeable verse. From the pewterers:

The Federalist plan most solid and secure
Americans their freedom will endure
All arts will flourish in Columbia's land
And all her sons join as one social band.

From the butchers:

Skin me well, dress me neat,
And send me aboard the federal fleet.

From the chairmakers:

The fed'ral states in union bound,
O'er all the world our chairs are found.

And from the joiners:

The federal ship will our commerce revive,
And merchants and shipwrights and joiners shall thrive.

As if to mark Heaven's own dispensation on the new Constitution, Federalists reported that the weather was fair, there was neither disorder nor injury, the procession was "well conducted," and the crowd retired after the day's events "without any instance of rudeness or intemperance."

There were other processions in Boston, Charleston, Baltimore, Annapolis, Hartford, New Haven, Newport, Trenton, Albany, and Portsmouth and Salem, N.H. The theme

By 1837, when the Constitution's jubilee was observed, the elements in the canonization of that document were all in place.

of union prevailed everywhere. An ode especially composed for the occasion in Albany typified the sentiment:

YORKERS rejoice! Your state is
SAV'D FROM BLOOD!
UNION protects her with a
guardian's care;
DISCORD, that threaten'd like a
raging flood,
Has spent the fruitless breath in
empty air.

Bostonians held their parade on February 8, 1788, as soon as their own state had ratified the Constitution and before the requisite number of nine states had acted, but the Bay Staters were confident the new charter would go into effect. The centerpiece of their procession was a ship, the *Federal Constitution*, drawn by thirteen horses, symbolizing the embarkation of the new government on the sea of liberty. (The federal ship became the focus of most celebratory parades thereafter.) Again, observers remarked on how "Everything was conducted with the greatest order," and how "Candor, Love, Harmony, Friendship, and Benevolence" prevailed. In the rhetoric of the Federalists, the word "federal" connoted everything that was good, honest, dignified, and American.

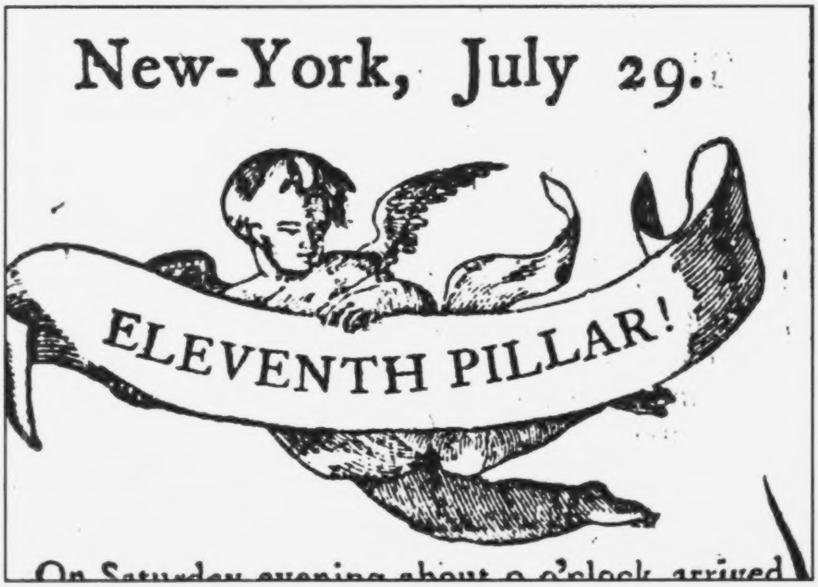
Philadelphia's grand procession topped them all. It was held on July 4, 1788, after the ninth state had ratified, and it linked Washington, Independence, and the new Constitution in a near-mystical trinity. Charles Willson Peale, the artist, and Francis Hopkinson, the writer, were the principal organizers. Peale designed a "Grand Federal Edifice" for the march. It had thirteen Corinthian columns, and around the pedestal were the words "In union the fabric stands firm." The procession also displayed a Federal ship, the *Union*. Pennsylvania's Chief Justice Thomas McKean rode on another float, carrying a copy of the Constitution and standing inside the figure of a giant bald eagle which stood thirteen feet high and sported thirteen stars and stripes. Seventeen thousand people—half the population of Philadelphia—assembled to meet the procession at its close and to dine on 4,000 pounds of beef, 2,500 pounds of lamb, and 3,500 gallons of beer. The ode which Hopkinson wrote for the occasion reiterated the now universal theme:

And let the PEOPLE'S Motto ever
be,
UNITED THUS, and THUS
UNITED-FREE.

Nature cooperated once more. The sky was overcast during the procession, shielding the participants from the hot sun. A cool breeze blew all day, and "in the evening the sky was illuminated by a beautiful aurora borealis." Benjamin Rush, observing the parade, remarked with pleasure that hundreds were heard to comment that "Heaven was on the federal side of the question."

At the close of the day's events, Rush proudly exclaimed: " 'Tis done! We have become a nation." But the Federalists could not rest on these slim laurels. The Constitution was not quite universally accepted. Albany's Anti-Federalists observed the Fourth of July by publicly burning a copy of the new frame of government; at Carlisle, Pennsylvania, they prevented a public celebration; and in Providence, R.I., armed Anti-Federalists broke up an incipient Federalist barbecue. If, as Carl van Doren has declared, the grand federal processions were "symbolic act[s] of faith in the future of the United States," the symbols would have to be reinforced over and over again during the next half-century to give them permanency.

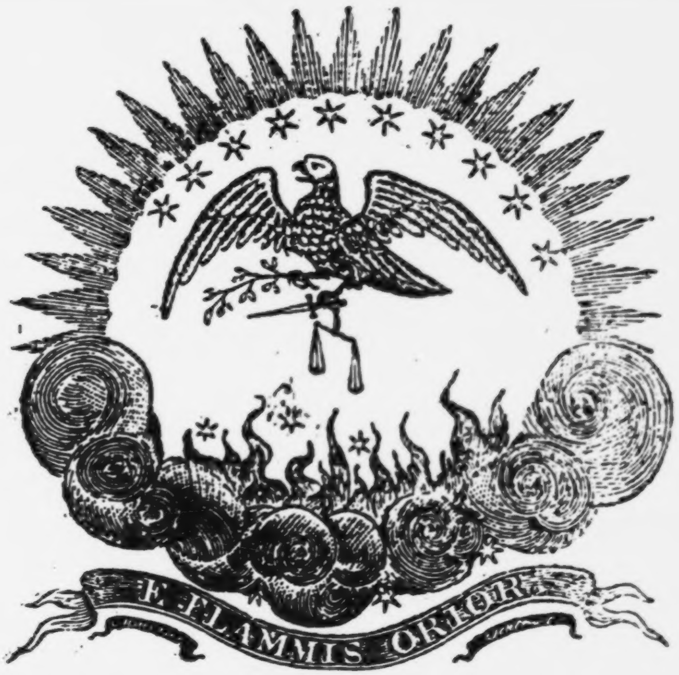
Illustration in celebration of New York's ratification, July 25, 1788. New-York Packet, *July 29, 1788. American Antiquarian Society.*



New-York, July 29.

ELEVENTH PILLAR!

On Saturday evening about 9 o'clock arrived



Emblematic eagle preceding two odes to the Constitution printed in the New-York Packet, *July 25, 1788. Library of Congress.*

Reinforcement

Politicians, editors, historians, clergymen, lawyers, and educators joined in the effort to make the Constitution an emblem of national unity and virtue. Religion was invoked to demonstrate that the Constitution was as much a part of the divine plan as the Revolution, already sanctified in the public imagination. A Connecticut newspaper early sounded the spiritual note in proclaiming that "pious men of all denominations will thank God for having provided in our Federal Constitution an ark, for the preservation of the justice and liberties of the world." Benjamin Franklin in a geriatric burst of uncharacteristic religious zeal, expressed his certainty that so momentous an event as the creation of a new government under the Constitution could not have occurred "without being in some degree influenced, guided and governed" by divine Providence. New England preachers assured their congregations that the inauguration of the new government in 1789 was "declarative of the superintendence of God," and a Connecticut magazine challenged any true Christian to deny that Heaven itself had inspired the new government, "calculated to promote the glory of God."

The judiciary joined in the beatification of the Constitution. Judge Alexander Addison of the Pennsylvania Court of Common Pleas, dubbed by Jeffersonians "the transmontane Goliath of federalism," demonstrated the depth of his covictions in one of his jury charges in 1791:

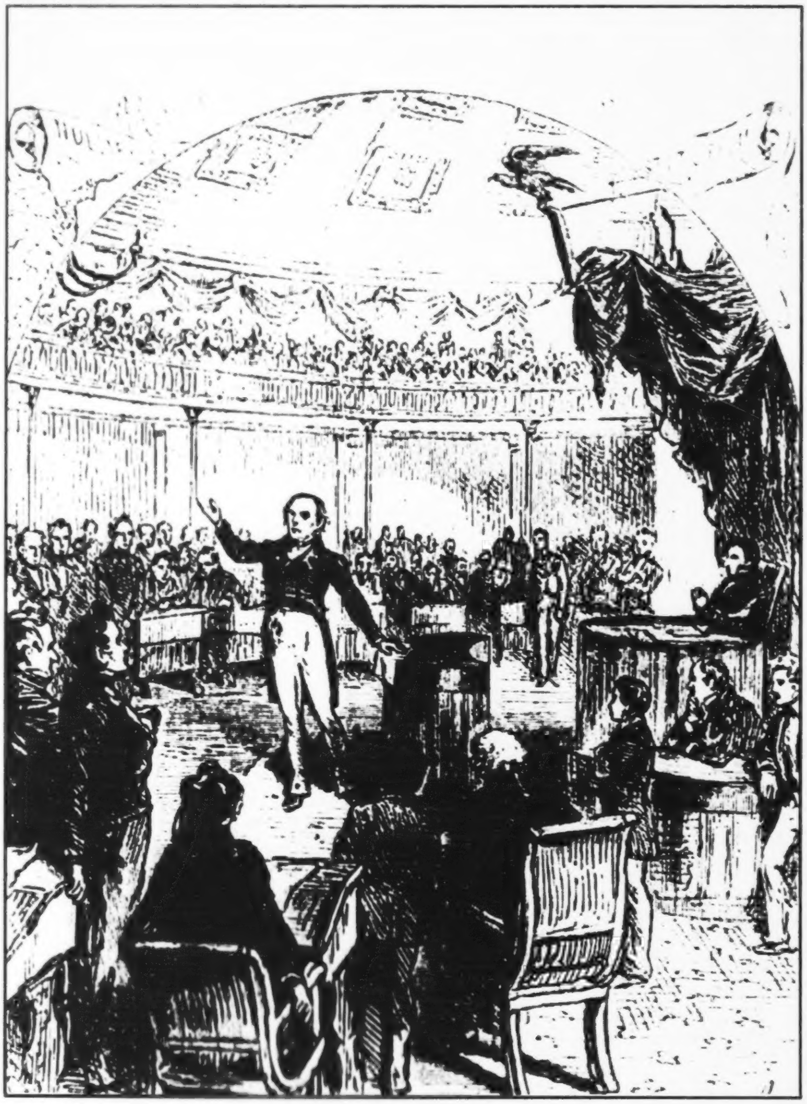
> The laws and Constitution of our government ought to be regarded with reverence. Man must have an idol. And our political idol ought to be our Constitution and laws. They, like the ark of the covenant among the Jews, ought to be sacred from all profane touch.

The death of Washington in 1799 permitted the myth-makers to link his already widespread fame with the Constitution's efficacy. Thus, George Minot, historian and secretary of the Massachusetts ratifying convention, rhapsodized in this eulogy to the fallen hero:

> The people he has saved from external tyranny suffer from the agitations of their own unsettled powers. The tree of liberty, which he has planted and so carefully guarded . . . flourishes beyond its strength. . . . But he comes! In convention he presides over councils, as in war he had led to battle. The Constitution, like the rainbow afer the flood, appears to us now just emerging from an overwhelming commotion; and we know the truth of the pledge from the sanction of his name. The production was worthy of its authors. . . . you cherish it, . . . and resolve to transmit it, with the name of Washington, to the latest generation, who shall prove their just claim to such an illustrious descent.

Historians and textbook writers lent their hand in the movement to canonize the Constitution. With the exception of the Anti-Federalist Mercy Otis Warren, virtually all of the early historians were ardent promoters of the new framework of government. David Ramsay conceded that the Articles served a purpose in demonstrating the need for reform. The Constitution itself, he wrote, was a "triumph of virtue and good sense, over the vices and follies of human nature." It combined "law with liberty, energy with safety, the freedom of a small state with the strength of a great empire." Ratification was the last act in the great national drama initiated by the Revolution. John Marshall, in his *Life of Washington*, did not devote much attention to the Constitution because he treated it as foreordained, but he took time to note the "imbecility" of those who wrote the Articles, which he called "absolutely unfit for use" and praised the Framers as "men of enlarged and liberal minds." The Constitution he regarded as the only hope of national government; on its success depended "the union of the states, and the happiness of America."

By 1837, when the Constitution's jubilee was observed, the elements in the canonization of that document were all in place, and the Constitution had begun to weave its



Daniel Webster replying to Robert Hayne in their 1830 debate on the Constitution, engraving from Our First Century *(1876). Collection of the Architect of the Capitol. Library of Congress.*

"word-magic" spell over the American people. The document signed in Philadelphia fifty years earlier was portrayed as the sheet anchor of national stability. It had rescued the nation from post-Revolutionary disaster. It fulfilled the wishes of the signers of the Declaration. It was the capstone of the War for Independence. It not only defined the past but shaped the present and ordained the future. And it was the work of heroes viewed in the hazy light of semi-divinity. They were to be honored for their prudence, integrity, and virtue. They were to be revered as true Fathers of the Country. Indeed, their only flaw was that, in doing their work so perfectly, they had left so little for future generations to do. At best, later Americans could remain faithful to the "precious memory of the sages" who had taught them republican virtue. And the Constitution itself was the symbol of their handiwork under Providence's guidance.

Perhaps the greatest tribute to the new symbolism and mythology was the relative speed and ease with which former critics of the Constitution accepted it and joined in paying their homage to it. As Charles Pettit, a Pennsylvania Federalist put it in 1800, with some amazement, despite the intensity of political factionalism and partisan strife, "both parties profess an attachment and reverence for, the Constitution as their guide." When they differed, he noted, each charged the other "with designs to warp, subvert, and destroy the Constitution itself."

It was left only to describe the nation's half-century old charter in terms of perfection: "the most perfect social compact the wisdom of man has hitherto devised," exulted one Fourth of July orator; the "consummation" of America's history, John Quincy Adams announced in his inaugural address; the "palladium of American liberty," Story boasted in his *Commentaries on the Constitution*; the "nearest approach to supreme wisdom," Daniel Webster declaimed in the halls of Congress; and "the most wonderful instrument ever drawn by the hand of man," unparalleled in its "comprehension and precision," Justice William Johnson announced from his seat on the Supreme Court bench. In his Farewell Address to the nation in 1837, Andrew Jackson assured citizens that the Constitution was "no longer a doubtful experiment" and that under its superintendency, the country had preserved liberty and property and promoted prosperity. And John Quincy Adams gave a celebratory address in New York City linking the Declaration of Independence with the Constitution "as parts of one consistent whole."

An Unstable Instrument

But there was disturbing evidence that the constitutional cult would have to continue to be nurtured in the years ahead. The date the Constitution was signed, September 17, had never been celebrated as a national holiday, and it was not so observed at its jubilee. (It was not to be designated officially as a commemorative day until 1952!) The day was a Sunday in 1837, and Congress was not in ses-

> *"The Constitution was intended as an instrument of great political good; but we sometimes so dispute its meaning, that we cannot use it at all."*
>
> *—Daniel Webster, 1842*

sion, but neither house marked the event by even so much as a word the day before or the day after. Both houses were absorbed in debates over the new banking system and the annexation of Texas. The date was ignored in the public prints, as well. Newspapers carried accounts for September 17 of a balloon ascent by a female astronaut, a 24-hour horse race, nonstop, employing 12 horses over a 788-mile course, and the discovery of the remains of a mastodon in Rochester, N.Y., but not a line about Constitution Day. A new magazine launched in October 1837 to promote democratic political principles contained no reference to the anniversary of the signing of the Constitution, although it did carry a poem dedicated to the warship *Constitution*.

Why was the national symbol, so sedulously cultivated by friends of the Constitution for a half-century now ignored? For one, July 4th had already become the centerpiece of patriotic observances, utilized by temperance and peace advocates, abolitionists and war veterans, to identify American ideals with their causes. Independence and Union, the Declaration and the Constitution, Washington and the Founding Fathers were all merged imperceptibly in these observances, leaving little room for distinctive recognition of Constitution Day. And even the Glorious Fourth had lost some of its old emotional appeal as it became formalized or deteriorated from a holy day to a holiday. There were editorial complaints that the celebrations had degenerated into drinking orgies, "eating, firing of guns, dancing, and quarreling." Only Americans, one writer complained, would blemish the anniversary of their birth as a nation by getting wildly inebriated.

More important in the blurring of the Constitution in the public imagination was the growing focus on the document as a yet unstable instrument of government. It could scarcely evoke unanimity as a symbol when the meaning of the Constitution was debated bitterly on the stump and in Congress. While Webster and Hayne both avowed their allegiance to the Constitution in their historic debate in 1830, the event was, in Max Lerner's words, "the climax of the attempt to solve national problems through constitutional symbols; and the attempt was a failure." Cynics like Senator William Crawford of Georgia declared himself sick of eulogies of the Constitution by advocates of national power or states' rights. "The gentlemen . . . still view it as a model of perfection. They are certainly at liberty to entertain that opinion. Every man has a right to erect his idol in this land of liberty, and to worship it according to the dictates of his conscience."

An innocuous joint resolution introduced in Congress in 1837 to appropriate $30,000 for the acquisition of certain manuscripts of James Madison dealing with the Constitutional Convention provoked a furious debate between Webster and Calhoun over whether Congress had the power to spend money, under the "general welfare" clause, for this purpose. John Niles of Connecticut noted wearily: "Who is to decide what is the true theory and exposition of the Constitution? This has been a subject of controversy from the formation of the Constitution." Americans might still agree that the Constitution was a palladium of liberty but they could not decide whether its beneficence stemmed from its character as the supreme law of a nation or as a compact among sovereign states. Benjamin Rush, who had hailed the adoption of the Constitution in 1788 as testimony to the creation of a nation was not at all so sure twenty years later. In the midst of the international difficulties with Britain and France, Rush asked bitterly: "What shall we fight for? For our Constitution? I cannot meet with a man who loves it. It is considered as too weak by one half of our citizens and too strong by the other." And an equally despairing Daniel Webster complained in 1842 that "The Constitution was intended as an instrument of great political good; but we sometimes so dispute its meaning, that we cannot use it at all."

Resolution of the issue was not to come until the Civil War, but from that bloody conflict was to emerge a symbolism even more powerful than the one first created by the Federalists. The new cult of the Constitution made that document the hallmark of laissez-faire conservatism and a bulwark against radical socialism; but it also came to signify, in time, the promise of opportunity, equality, and expanding democracy for others. The meanings changed, but the symbol remained as the vehicle of the nation's life, an idealization of its best hopes and aspirations. Walter Bagehot once said that every government must contain something of the "dignified" or "majestic" principle to give cohesive force to its existence. For a nation that had eschewed the monarchies, aristocracies, and established churches that were emblematic of European societies, perhaps the Constitution, signifying the rule of law, was not such an inappropriate symbol.

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DOCUMENTS

The Federal Constitution, Boys, and Liberty Forever: Music and the Constitution

by JANNELLE WARREN-FINDLEY

The history of a time is reflected in its music. Music serves to provide a cultural context for action, as when the march "Hail to the Chief" announces the arrival of the President of the United States. Music also serves as a document of that culture, like a newspaper story with a tune. In the case of the making and ratifying of the Constitution of the United States, songs were used both in support of and in dissent from those activities. Published either in local newspapers or as broadside ballads sold on the street, with or without mention of a melody and, for the most part, offered anonymously, these early pieces allow us to hear fragments of the debate which progressed as the document itself was formed, examined, and ultimately accepted. These songwriters, like the politically-oriented folksingers and musical satirists of our century, frequently promoted a particular point of view on the process of constitution-shaping and ratification and attempted to persuade the listener to support that stand. The songs give modern listeners the means to explore some of the complexities of that process and reactions to it. They also allow us to hear a mixture of voices concerned with these important issues, because the broadsides were often written by citizens who were not themselves directly involved in constitution-making. The songs, in that sense, reflect something of a *vox populi* in contrast to the more formal written texts of the time.

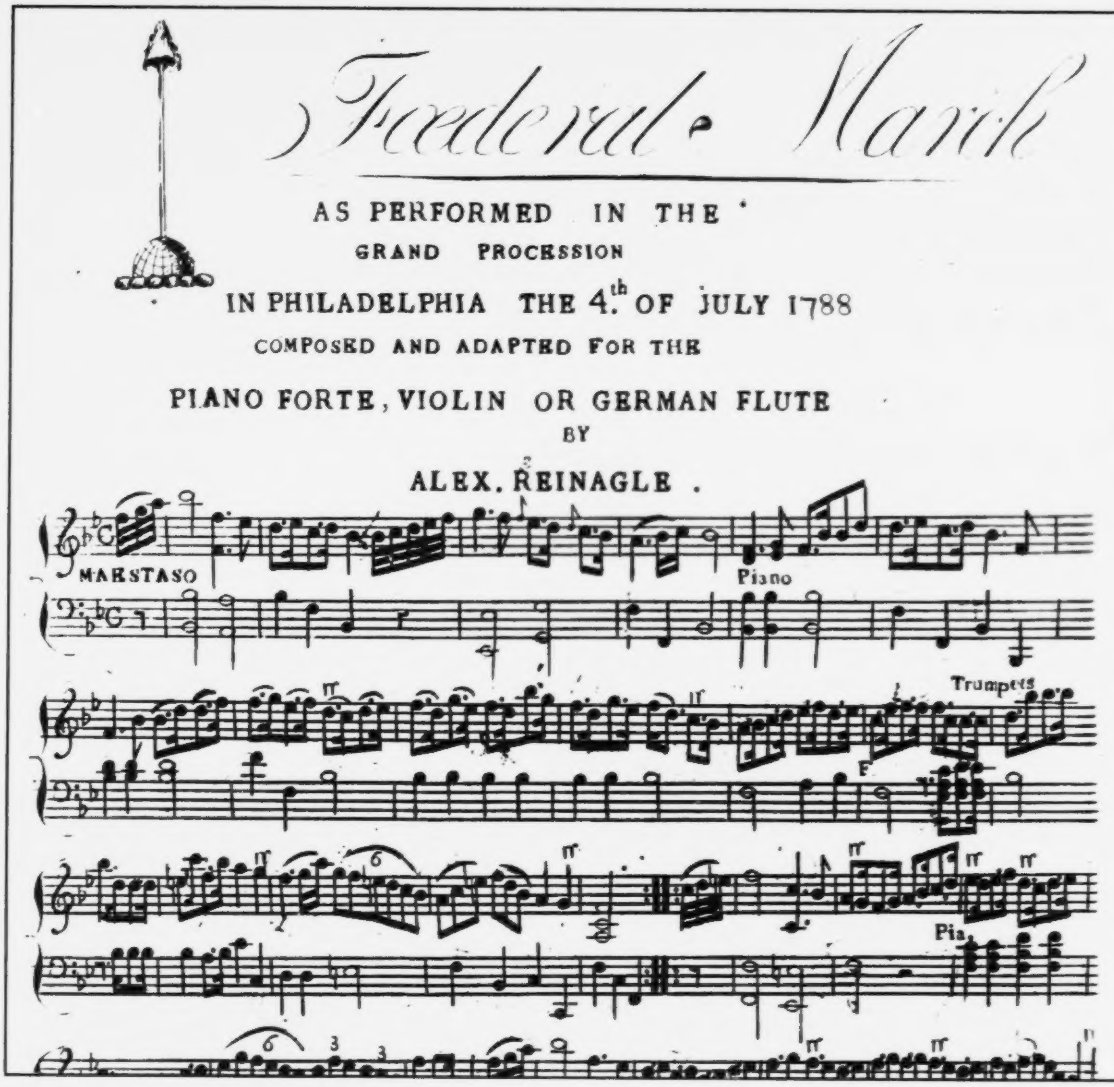
* * * * *

Philadelphia in the summer of 1787 was a hot, fly-infested place. To escape the discomfort, the delegates to the Constitutional Convention ended work at 3 p.m., though informal strategy sessions and personal politicking continued into evening activities. For some of the delegates, those evenings included concert-going. George Washington, for example, attended concerts frequently. On May 29, 1877 in Philadelphia, Washington heard a Mr. Juhan perform. The program from that evening survived; the audience was treated to a mix of musical types. Two pieces by Alexander Reinagle, an English composer who had come to America as the music teacher of Washington's stepdaughter, Nelly Custis, and a "solo violine[sic] newly composed" by Juhan, himself an immigrant composer, were featured. The evening's music was rounded out by flute, violin and "guittar" [sic] numbers and two overtures from ballad operas. On June 12, General Washington, perhaps in the company of other delegates, heard a concert at the City Tavern. Alexander Reinagle performed, possibly playing one of his own sonatas written for piano-forte or harpsichord.

Other musical occasions undoubtedly helped to lighten the tension and oppressive heat as the delegates passed the summer arguing, debating, and shaping fundamental laws by which to govern a free society. Music and musical activities were, in fact, widespread in the America of the 1780s. Music travelled to the colonies with deeply devout settlers who filled their new churches with unaccompanied song. Early musical organizations developed out of singing societies which the clergy encouraged to improve the congregational rendition of psalms. Coming from those origins, New York had a "Musick Club" as early as 1744. Music-lovers formed the St. Cecilia Society in Charleston in 1762. Philadelphia's Orpheus Club appeared in 1759 and Boston's Music Society followed in 1786. Groups also formed in Concord, Baltimore, Fredericksburg and Newport before 1800. These groups gave only choral concerts.

Early music-making was not limited to sacred song. The newcomers brought with them a vast store of traditional secular songs which were mostly British in origin. These included worksongs and music for rituals like courting, love songs, dances, and marches. The settlers also recalled the past they had left behind through the ballads whose story-telling could preserve elements of the history of great events and small occasions in everyday life. A printed collection from the 1790s included traditional songs such as *Soldier's Joy*, *The Irish Washerwoman*, and *O Dear, What Can the Matter Be?*.

In addition to the more formal kinds of concertizing, music-making and musical expression, the British immigrants also carried with them a broadside tradition with lyrics based on the news of the day. The tradition began concurrently with the introduction of printing in England in the 1470s and was started by London street singers whose ballads were made up of current events and gossip. The lyrics were matched with well-known tunes. Originally, the lyrics of the broadside or "broadsheet" were printed on one side only of a sheet of paper and the singer sold printed copies of the verses to passers-by. The broadside used both journalistic and literary materials. As a literary historian has described it, "Journalistically, its province was that of the lurid and the startling. Ac-


Federal March
AS PERFORMED IN THE
GRAND PROCESSION
IN PHILADELPHIA THE 4th OF JULY 1788
COMPOSED AND ADAPTED FOR THE
PIANO FORTE, VIOLIN OR GERMAN FLUTE
BY
ALEX. REINAGLE.
MAESTASO
Piano
Trumpets
F
Pia

Federal March (1788) by Alex Reinagle. Library of Congress.

counts of crimes, disasters, monstrosities, and other violations of nature so agreeable to a sixteenth-century taste, were hastily printed and hawked about the streets for a penny. . . ."

These techniques of song-making eventually passed into theatrical practice. John Gay's *Beggar's Opera* (produced in London in 1728) and other ballad operas of the same period made the process even more popular and spread it more widely among the general population. "Every citizen," one musicologist claims, "had a means of expressing his opinion, while maintaining his anonymity, by composing new verses to an old tune and publishing them in newspapers, magazines or single ballad-sheets." While it seems unlikely that "every citizen" took advantage of the practice, many clearly participated in these growing public forms of expression.

The first sheet of printed matter to appear from an American press was a broadside. Stephen Daye's press, set up at Cambridge, Massachusetts in 1638, issued the "Freeman's Oath" in 1639. This type of expression concerned with American political events began to appear in the colonies in the eighteenth century. Songs, complete with the borrowing of tunes that were widely familiar, could be learned quickly and used as propaganda to promote various points of view. The practice must have developed early; by 1734, the attention of the authorities had been caught and a New York grand jury ruled against two allegedly "Seditious Songs."

The American Revolution, however, caused the full development of this kind of musical expression. The songs, one historian notes, "satisfied a number of needs arising from the war itself: to convey news of battles and naval engagements, to celebrate triumphs, to poke fun at the enemy, to promote an understanding of war aims, and to arouse the courage of men and women." Topical lyrics set to familiar popular tunes, the broadsides could play an important role because they informed and/or persuaded even as they entertained. And while occasions for entertainment were rare during the War itself (outside of British-controlled cities, at least), postwar theaters and taverns provided exposure for more political comment set to music.

Many American ballads written in the eighteenth century were found in colonial magazines and newspapers. They usually followed the English format of printing lyrics without music, although the title of the tune was frequently noted. It was not unusual, however, to have no melody noted for a given set of lyrics.

In fact, the best-known song written to support ratification has a disputed tune. "The New Roof (A New Song for Federal Mechanics)" by Francis Hopkinson, which is also sometimes called "The Raising," had no surviving music manuscript or familiar tune assigned. One music student claims that "To Anacreon in Heaven" (the tune for the "Star-Spangled Banner") was used but the lyrics do not fit the music easily, and it thus seems an unlikely choice.

Francis Hopkinson was accomplished enough as a musician to use music that fit his work. A lawyer and judge, a signer of the Declaration of Independence in addition to his various artistic avocations, Hopkinson laid claim to being the first composer in the United States. In 1759, just four years out of the College of Philadelphia (later the University of Pennsylvania) he wrote the first of his four secular songs which make up the bulk of pre-Revolutionary non-religious composed music in the colonies. This group included *My Days Have Been So Wondrous Free; The Garland; Oh! Come to Mason Borough's Grove;* and *With Pleasures Have I Past My Days.* During the Revolutionary War, Hopkinson wrote "The Battle of the Kegs," a spoof of an experiment with floating mines on the Delaware River.

Hopkinson was not a delegate to the Constitutional Convention, so the exact role that he or his broadside played is not known. As one of the leading citizens of Philadelphia, however, he must have had frequent contact with the delegates after the day's meetings ended. The 1901 "History of the University of Pennsylvania" asserted that "he was an active participator in the debates of the convention of 1787 which formed the Constitution of the United States, and he produced at this time a humorous work, entitled 'The History of a New Roof,' which seems to have had a great influence upon some of the most distinguished men of the time."

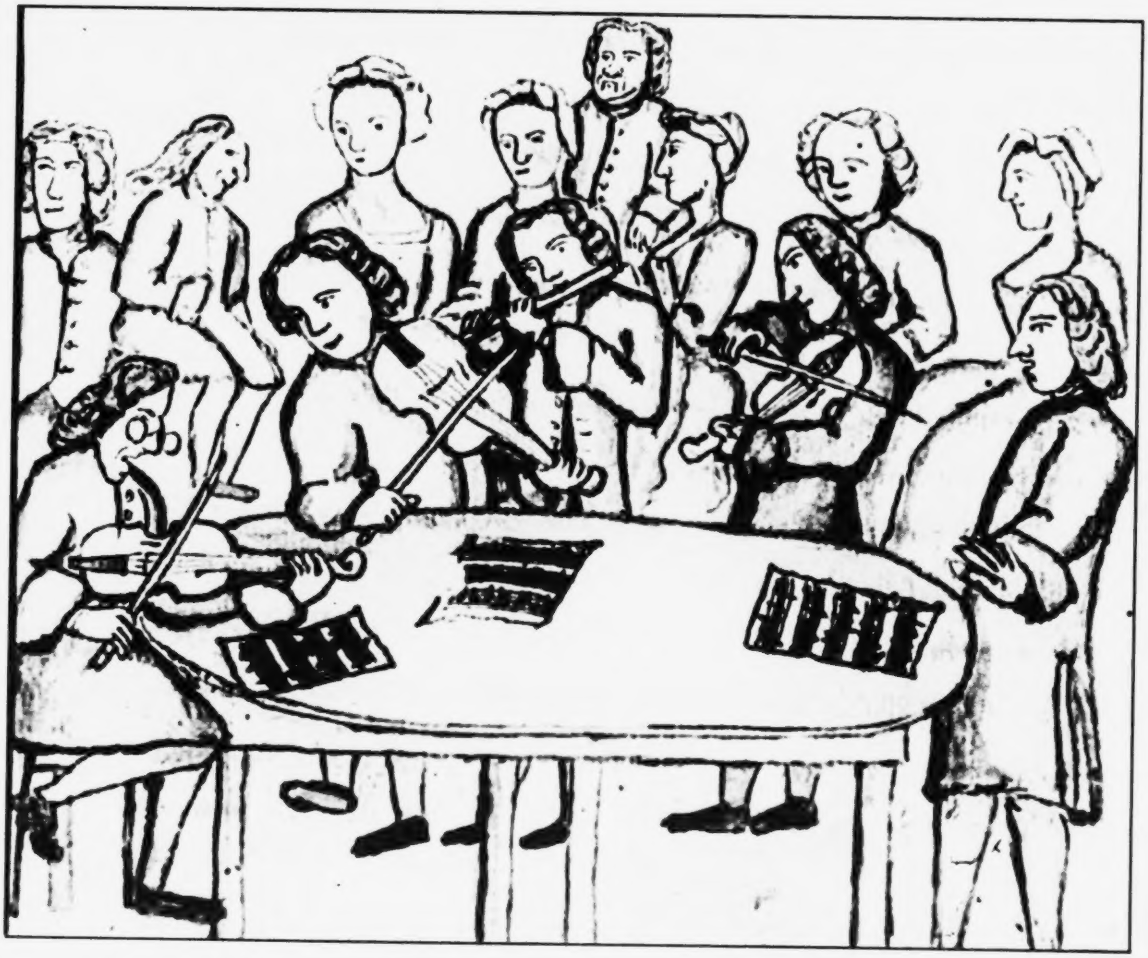
The "New Roof" portrayed the government formed under the Articles of Confederation as a mansion with a decaying roof. Despite the short period of use, it needed repair and its owners called in architects to recommend how to proceed. They found that thirteen key rafters were unconnected by the kinds of braces or ties necessary for effective union. Some rafters were warped from too much weight, some shrunk from too little weight. Other symbolic architectural flaws made a new roof necessary, and the piece closed with the family debating the new design. Hopkinson apparently adapted the song "The New Roof (A New Song for Federal Mechanics)" from that prose parable.

THE NEW ROOF
(A NEW SONG FOR FEDERAL MECHANICS)

Come muster, my lads, your mechanical tools,
Your saws and your axes, your hammers and rules;
Bring your mallets and planes, your level and line,
And plenty of pins of American pine;
For our roof we will raise, and our song still shall be,
Our government firm and our citizens free.

Come, up with the plates, lay them firm on the wall,
Like the people at large, they're the ground-work of all.
Examine them well and see that they're sound,
Let no rotten parts in our building be found;
For our roof we will raise, and our song still shall be,
Our government firm, and our citizens free.

Now hand up the girders, lay each in his place,
Between them the joists must divide all the space.
Like assembly-men, these should lie level along,
Like girders, our Senate prove loyal and strong.
For our roof we will raise, and our song still shall be,



Eighteenth-century music makers. History of the Tuesday Club. John Work Garrett Collections of the Milton S. Eisenhower Library, The Johns Hopkins University.

A government firm, over citizens free.

The rafters now frame—your King-Posts and braces,
And drive your pins home, to keep all in their places;
Let wisdom and strength in the fabric combine,
And your pins all be made of American pine.
For our roof we will raise, and our song still shall be,
A government firm, over citizens free.

Our King-Posts are Judges—How upright they stand,
Supporting the Braces, the Laws of the Land—
The laws of the land, which divide right from wrong,
And strengthen the weak by weak'ning the strong.
For our roof we will raise, and our song still shall be,
Laws equal and just for a people that's free.

Up! up with the rafters—each frame is a State!
How nobly they rise! their span, too, how great!
From the north to the south, o'er the whole they extend,
And rest on the walls, while the walls they defend.
For our roof we will raise, and our song still shall be,
United as States, but as citizens free.

Come, raise up the turret—our glory and pride—
In the centre it stands—o'er the whole to preside;
The sons of Columbia shall view with delight
Its pillars and arches and towering height.
Our roof is now raised, and our song still shall be,
A Federal Head, o'er a people still free.

Hazza! my brave boys, our work is complete,

The world shall admire Columbia's fair seat;
Its strength against tempests and time shall be proof,
And thousands shall come to dwell under our roof.
Whilst we drain the deep bowl, our toast still shall be,
Our government firm, and our citizens free.

Irwin Silber, ed. *Songs America Voted By* (Harrisburg, Pa.: Stackpole Books, 1971), p. 20.

Hopkinson's architectural imagery took the country by storm and reoccurred in ratification parades and political rhetoric. Built on the "plates" like the people at large, "girded" by the Senate, with "King-Posts" as judges braced by the laws and rafters as the states both supporting and supported by the walls, "Columbia's fair seat" was solid. The new roof was topped by the turret which, as "A Federal Head" (otherwise known as the president), stood guard over the mansion of freedom.

Hopkinson's Federalist sympathies were by no means the last words penned in song form, though the various ways of expressing views about the matter differed dramatically. As Vera Brodsky Lawrence notes in her brilliant book, *Music for Patriots, Politicians, and Presidents: Harmonies and Discords of the First Hundred Years,* "an avalanche of songs variously urged, discouraged, congratulated, or wryly commented as states ratified or hung back. . . ." The following song, with its mix of classical allusion, vernacular expression and the Federalist version of recent American history, appeared just after the Convention ended. The anonymous author published it in the *Massachusetts Centinel* on October 6, 1787.

THE GRAND CONSTITUTION
Or, The PALLADIUM of COLUMBIA:
A New FEDERAL SONG.

Tune—"Our Freedom We're Won," &c.

From scenes of affliction—Columbia opprest—
Of credit expiring—and commerce distrest,
Of nothing to do—and of noting to pay—
From such dismal scenes let us hasten away.
Our Freedom we're won, and the prize let's maintain
Our hearts are all right—
Unite, Boys, Unite,
And our EMPIRE in glory shall ever remain.

The Muses no longer the cypress shall wear—
For we turn our glad eyes to a prospect more fair:
The soldier return'd to his small cultur'd farm,
Enjoys the reward of his conquering arm.
"Our Freedom we've won," &c.

Our trade and our commerce shall reach far and wide,
And riches and honour flow in with each tide
Kamschatka *and* China *with wonder shall stare,*
That the Federal *Stripes should wave gracefully there.*
"Our Freedom we've won," &c.

With gratitude let us acknowledge the worth,
Of what the CONVENTION has call'd into birth,
And the Continent widely confirm what is done
By FRANKLIN, the sage, and by brave WASHINGTON.
"Our Freedom we've won," &c.

The wise CONSTITUTION let's truly revere,
It points out the course of our EMPIRE to steer,
For oceans of bliss do they hoist the broad sail,
And peace is the current, and plenty the gale.
"Our Freedom we've won," &c.

With gratitude fill'd—let the great Commonweal
Pass round the full glass to Republican

zeal—
From ruin—their judgment and wisdom well aim'd;
Our liberty, laws, and our credit reclaim'd.
Our Freedom we've won, &c.

Here Plenty and Order and Freedom shall dwell,
And your Shayses and Dayses won't dare to rebel—
Independence and culture shall graciously smile,
And the Husbandman reap the full fruit of his toil.
"Our Freedom we've won," &c.

That these are the blessings, Columbia knows—
The blessings the Fed'ral CONVENTION bestows.
O! then let the People confirm what is done
By FRANKLIN the sage, and by brave WASHINGTON.
Our Freedom we've won, and the prize will maintain
By Jove we'll Unite
Approve and Unite—
And huzza for Convention again and again.

Vera Brodsky Lawrence, *Music for Patriots, Politicians, and Presidents: Harmonies and Discords of the First Hundred Years* (New York: Macmillan Publishing Co., 1975), p. 101. (Used with permission.)

"Shayses and Dayses" refers to Shays' rebellion and helps to remind the singer of the reasons for writing the Constitution. As this song points out, the great ship EMPIRE, guided by the Constitution, will sail away from the lawless uprisings, credit crises, commercial problems and financial distress, the legacy of the Articles of Confederation, just as soon as ratification occurs. The ship, setting off "for oceans of bliss" on a current of peace and a wind of plenty would have as captains the "sage" Franklin and "brave" Washington. Their presence would complete a common triad of symbols: the Federal ship, with the two heroes who steered her new course.

Francis Hopkinson. *Library of Congress.*

As the document went to the states for ratification, its progress could be charted by the songs produced to mirror or to influence the debate. While Pennsylvania had to resort to physical violence to maintain a quorum for its motion to hold a ratifying convention, its papers did not reflect the full debate; the Federalists "bought up" all the local papers and featured only their own point of view. Nonetheless, Philadelphia Anti-Federalist poet Peter Markoe wrote "The Times" and "The Storm" to link the Federalists to religious heresy, luxury, and standing armies to enforce the system of checks and balances.

Another "anti" described with contempt the parade held at the conclusion of the ratification process in Massachusetts, and by extension, the backing and filling of the convention itself. In "The Grand Federal Edifice" (no tune noted) the writer commented,

There they went up, up, up,
And there they went down, down, downy,
There they went backwards and forwards,
And poop for Boston towny!. . . .

Lawrence, *Music for Patriots* . . . , p. 106.

In response to this slur, another anonymous versifier published a different description of ratification in the *Massachusetts Centinel.* The "Yankee song," with its symbolic thirteen verses, tells in a straightforward fashion what happened at the Massachusetts convention. Upon assembly, the Anti-Federalists seemed to be in the majority. John Hancock, who had been chosen to preside, stayed away with an attack of gout (or perhaps of indecision since he apparently wanted to come out on the winning side). Hancock, finally persuaded to appear, indeed made a "woundy [top-notch] fed'ral speech" in which "The Fed'ralists agreed t'adopt, and then propose amendment," the list of amendments which removed most objections to ratification. The "devilish" [deucid] lads then made a fine parade to celebrate. Rather than going up and up and down and down, as the first song alleges, the ratification parade featured elements common to all such celebrations: workers with their tools, the "ship of state" (a float ridden by John Foster Williams, a Revolutionary naval officer from Boston), a feast where toasts were drunk to the past, the future and the constitutional heroes. Although no music was noted, the tune is certainly "Yankee Doodle."

YANKEE SONG

The 'Vention did in Boston meet,
But State-House could not hold 'em,
So then they went to Fed'ral street,
And there the truth was told 'em—
Yankee Doodle, keep it up!
Yankee doodle dandy,
Mind the musick and the step,
And with the girls be handy.

They ev'ry morning went to prayer,
And then began disputing,
'Till opposition silenc'd were,
By arguments refuting.
Yankee Doodle, etc.

Then 'squire Hancock like a man,
Who dearly loves his nation,
By a concil'atory plan
Prevented much vexation.
Yankee doodle, etc.

He made a woundy fed'ral speech,
With sense and elocution;
And then the 'vention did beseech
T'adopt the Constitution.
Yankee doodle, etc.

The question being outright put,
(Each voter independent)
The Fed'ralists agreed t'adopt,
And then propose amendment.
Yankee doodle, etc.

The other party seeing then
The people were against 'em,
Agreed like honest, faithful men,
To mix in peace amongst 'em.
Yankee doodle, etc.

The Boston folks are deucid lads,
And always full of notions;
The boys, the girls, their 'mams and dads,
Were filled with joy's commotions.
Yankee doodle, etc.

So straightway they procession made,
Lord! how nation fine, Sir!
For ev'ry man of ev'ry trade,
Went with his tools—to dine, Sir.
Yankee doodle, etc.

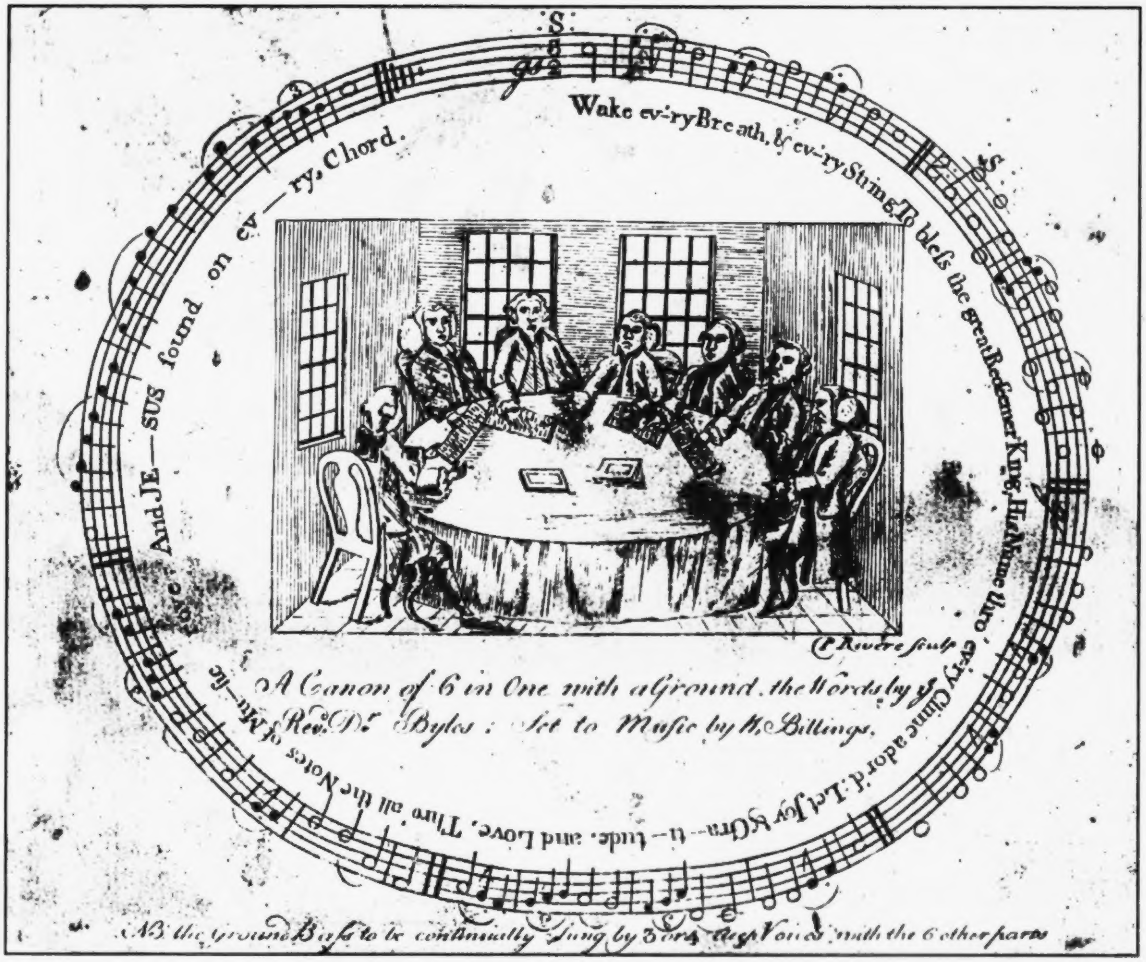
John Foster Williams in a ship,
Join'd in the social band, Sir,
And made the lasses dance and skip,
To see him sail on land, Sir.
Yankee doodle, etc.

Oh then a whopping feast begun,
And all hands went to eating;
They drank their toasts—shook hands and sung,
Huzza! for 'Vention meeting.
Yankee doodle, etc.

Now Politicians of all kinds,
Who are not yet decided;
May see how Yankees speak their minds;
And yet are not divided.
Yankee doodle, etc.

Then from this sample let 'em cease,
Inflammatory writing,
For FREEDOM, HAPPINESS and PEACE,
Is better far than fighting.
Yankee doodle, etc.

So here I end my Fed'ral song,
Composed of thirteen verses,
May agriculture flourish long,


Wake ev'ry Breath, & ev'ry String To bless the great Redeemer King, His Name thro' ev'ry Clime ador'd. Let Joy & Gra-ti-tude, and Love, Thro' all the Notes of Mu-sic rove, And JE—SUS found on ev—ry Chord.
P. Revere sculp
A Canon of 6 in One with a Ground. the Words by the Revd. Dr. Byles: Set to Music by W. Billings.
N.B. the Ground Bass to be continually Sung by 3 or 4 deep Voices with the 6 other parts

Frontispiece for The American Chorister (1770), engraved by Paul Revere. Library of Congress.

And commerce fill our purses.
Yankee doodle, etc.

Lawrence, *Music for Patriots . . .*, p. 107.

To urge the New York convention to vote affirmatively on ratification, a song composed for the Fourth of July 1788 expressed its sentiments in a stylized, florid form. According to Lawrence, the authors met at Mr. Dawson's tavern in the town of "Brooklyne" to celebrate the holiday. The tune, although not mentioned, may be "The hounds are all out, etc.". In "A Federal Song," excerpted here, they compare the Fourth of July to the national days of England, Scotland and Ireland and urge that such a "day of delight" deserves a strong federal government. The song continues:

In freedom and blest independence secure,
Our prosperity scarce is alloy'd;
So vast a profusion of favors, is sure
More than country has ever enjoy'd.
But one thing is needful; a government free,
Just and fed'ral, efficient and strong,
This land must adopt, or alas! we shall sewe
An end to its greatness ere long.

Ye well approv'd patriots, whose talents and worth
Our most grateful expressions demand,
On this awful occasion we challenge you forth,
In defense of the union to stand;
Those ant's [sic] arrest, in their daring career,
Who for gain would their country undo;
From them we have ev'rything evil to fear,
And all things to hope for from you.

Now let the charg'd glasses go chearfully round,
Thro this little republican band—
In such friendship and firm unanimity bound,
May the thirteen fair pillars e'er stand.
In hilarity thus while we spend this blest day,
While we raise the bright bumpers on high,
(Our hearts full as our glasses) let each of

us say
Here's again to the FOURTH OF JULY.

Lawrence, *Music for Patriots* . . . , p. 111.

The Anti-Federalists in New York also used song. In reaction to the actions of the New York convention at Poughkeepsie, for example, an anonymous dissenter published the following in *The New York Journal and Daily Patriotic Register*, July 28, 1788. No tune was noted.

A SONG

What means their wisdoms roving to Poughkeepsie,
Their heads with politics are surely tipsey!
Why to the Druids ancient haunts be trotting,
Where naught but acorns on the ground lie rotting?
The oracles long since have left their oaks,
And minded now no more than pigs in pokes,
And laughed to scorn by every John a Nokes:
Unmask your faces then, and one and all
Sing falderal *and* anti-falderal.
CHORUS
Federal, falderal, federalist.
Your thumb to your mouth, and your nose to your fist,
Federal, falderal, federal tit.
Keep fast all behind you or you're surely b-t
Sing falderal, federal, ant's [sic] and yeomen,
Beware of the snare as you're truemen and freemen,
Federal, falderal, fiddle de day,
Falderal tit and tit falderay.

Lawrence, *Music for Patriots* . . . , p. 112.

But New York came in on July 25, despite the warnings of the "ant's" or Anti-Federalists to "beware of the snare." Word arrived that Virginia had ratified thus threatening New York with the "snare" of isolation despite her Anti-Federalist numbers.

To celebrate Virginia's entrance, Philadelphia held a giant constitutional parade on July 4, complete with a copy of the Constitution placed on a staff and carried aloft through the streets. Elaborate floats represented the ship of state, a giant American eagle and the federal edifice with three unfinished columns. The music included an ode by Francis Hopkinson, who also designed the celebration, and a march written by Alexander Reinagle, "The Foederal March."

"The Foederal March" was followed by others. A Mr. Sicard composed the *New Constitutional March* and *Federal Minuet* in fall 1788. Even after ratification was completed, with Rhode Island in May 1790, the celebration of the making of the Constitution continued. As time went on, the symbols became more generalized. The specific political references from the period—to Dayes and Shayes, for example—gave way to broader imagery which represented the union which had been constructed by an earlier generation. The men and events mentioned reflected the passage of time, so that the Constitution as primary document became intertwined with more recent developments.

In a discussion of a series of "Washington's marches," one music historian duplicated an example which was "very popular about 1800." He copied them from the Philadelphia Monthly Magazine for May 1798, where they read:

THE NEW YORK PATRIOTIC SONG,
called
THE FEDERAL CONSTITUTION BOYS,
AND LIBERTY FOREVER

Written by Mr. Milns—Sung by Mr. Williamson, the Music adapted by Mr. Hewitt, from Washington's March and Yankee Doodle.

I

Poets may sing of the Helicon streams,
Their Gods and their Heroes are fabulous dreams;
They ne'er sang a line
Half so grand, so divine,
As the glorious toast,
We Columbians boast,
The Federal Constitution, *boys, and Liberty forever.*

II

Adams the man of our choice guides the helm

No trumpet can harm us, no storm overwhelm;
Our sheet anchor's sure
And our bark rides secure,
So here's to the toast
We Columbians boast
The Federal Constitution *and the* President *forever.*

III

A free Navigation, Commerce and Trade,
We'll seek for no foe, of no foe be afraid;
Our frigates shall ride
Our defense and our pride;
Our tars guard our coast
And huzza to our toast
The Federal Constitution, Trade *and* Commerce *forever.*

IV

Montgomery, Warren, still live in our songs,
Like them our young *heroes shall spurn at our wrongs*
The world shall admire
The zeal and the fire
Which blaze in the toast
We Columbians boast
The Federal Constitution *and its advocates forever.*

V

When an enemy threats all party shall cease
We bribe *no intruders to buy a mean peace*
Columbians will scorn
Friends or foes to suborn;
We'll ne'er stain the toast—
Which as free men we boast—
The Federal Constitution *and* integrity *forever.*

VI

Fame's *trumpet shall swell in* Washington's *praise*
And Time *grant a furlough to lengthen his days;*
May health weave the thread
Of delight round his head—
No nation can boast
Such a name—such a toast—
The Federal Constitution, *Boys, and* Washington *forever.*

Oscar Sonneck, *Francis Hopkinson, The First American Poet-Composer (1737-1791) and James Lyon, Patriot, Preacher, Psalmodist (1735-1794)* (New York: Da Capo Press, 1967 [1905]), pp. 102-103.

John Adams was now president. Old heroes still "live in our songs" but younger heroes stepped forward to emulate then and to take their places. An event which may have been the "XYZ Affair" with its suggestions of bribery clearly still smarted. "The Federal Constitution" was linked, in these toasts, to general themes—liberty, trade and commerce, integrity—and to noted patriots, the President, the Federalists, and Washington. But the verses focus on current events which are made secure by the document, rather than on the document itself.

The shifting focus in this final example makes clear the distance between the events of the 1780s and the present, and the ascent of a new generation. The Federal Constitution had been ratified, was in fact the law of the land. But the toasts listed here reflect those older voices, raised in open debate about the country's future course. The details and the tone of the constitutional debate songs give a tantalizing glimpse of the charges, and the passions of people living through a crucial time in the development of the government of the United States. John Hancock had finally come through, the Ant's had lost, the new roof was in place. With the controversy over, the debate at rest, all could join the rousing, and finally collective chorus, "The Federal Constitution, boys, and Liberty forever."

Suggested Additional Reading:

Denisoff, R. Serge. *Sing a Song of Social Significance* (1972).
Lawrence, Vera Brodsky. *Music for Patriots, Politicians, and Presidents: Harmonies and Discords of the First Hundred Years* (1975).
Lawrence, Vera Brodsky. *Themes and Variations for Patriots, Politicians, and Presidents* (1975).
Rabson, Carolyn. *Songbook of the American Revolution* (1974).
Scott, John Anthony. *The Ballad of America: The History of the United States in Song and Story* (1983).
Silber, Irwin, ed. *Songs America Voted By* (1971).

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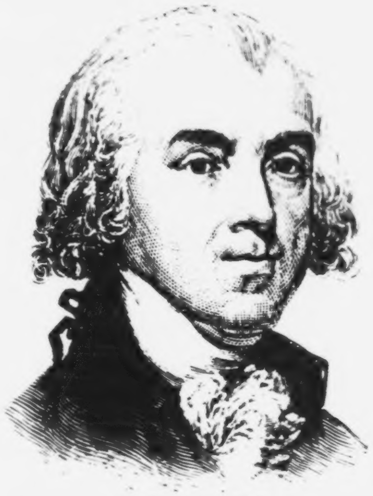
For the Classroom

Teaching With *The Federalist*

The following lesson is excerpted from LESSONS ON THE FEDERALIST PAPERS: SUPPLEMENTS TO HIGH SCHOOL COURSES IN AMERICAN HISTORY, GOVERNMENT AND CIVICS by John J. Patrick and Clair W. Keller, published by the ERIC Clearinghouse for Social Studies/Social Science Education at Indiana University, the Social Studies Development Center and the Organization of American Historians. The set of ten lessons is available from Publications Manager, Social Studies Development Center, Indiana University, 2805 East Tenth Street, Bloomington, IN 47405 for $12.00. (THE FEDERALIST No. 51 begins on the inside front cover of this issue.)



JAMES MADISON.

Teaching Plan: Separation of Powers with Checks and Balances in *The Federalist*, Numbers 47, 48, 51

Preview of Main Points

The purpose of this lesson is to increase students' knowledge of the concept of separation of powers and a related concept, checks and balances, as expressed in *The Federalist*. The lesson features excerpts from three papers of *The Federalist*, 47, 48, and 51. Students are asked to reflect upon the meaning and value of separation of powers and checks and balances as basic principles of government in the Constitution of the United States.

Curriculum Connection

This lesson can be used in combination with treatments of separation of powers and checks and balances in civics and government textbooks. It can be used to supplement the standard American history textbook chapter on the writing and ratification of the Constitution.

Objectives

Students are expected to:
(1) Identify and comprehend ideas on separation of powers in *The Federalist* 47, 48, 51.
(2) Examine and explain ideas on separation of powers in *The Federalist* 47, 48, 51.
(3) Find examples of separation of powers in the Constitution and explain how they fit ideas expressed by Madison in *The Federalist*.
(4) Evaluate ideas on separation of powers in terms of criteria in *The Federalist*.
(5) State and justify a position about the value of separation of powers as a basic principle of government in the Constitution.

Suggestions for Teaching the Lesson

Opening the Lesson. Ask students: What is separation of powers in government? What is checks and balances in government? Have students read the first part of the lesson to follow up on the opening discussion and to reinforce knowledge of separation of powers that they bring to the lesson from other sources.

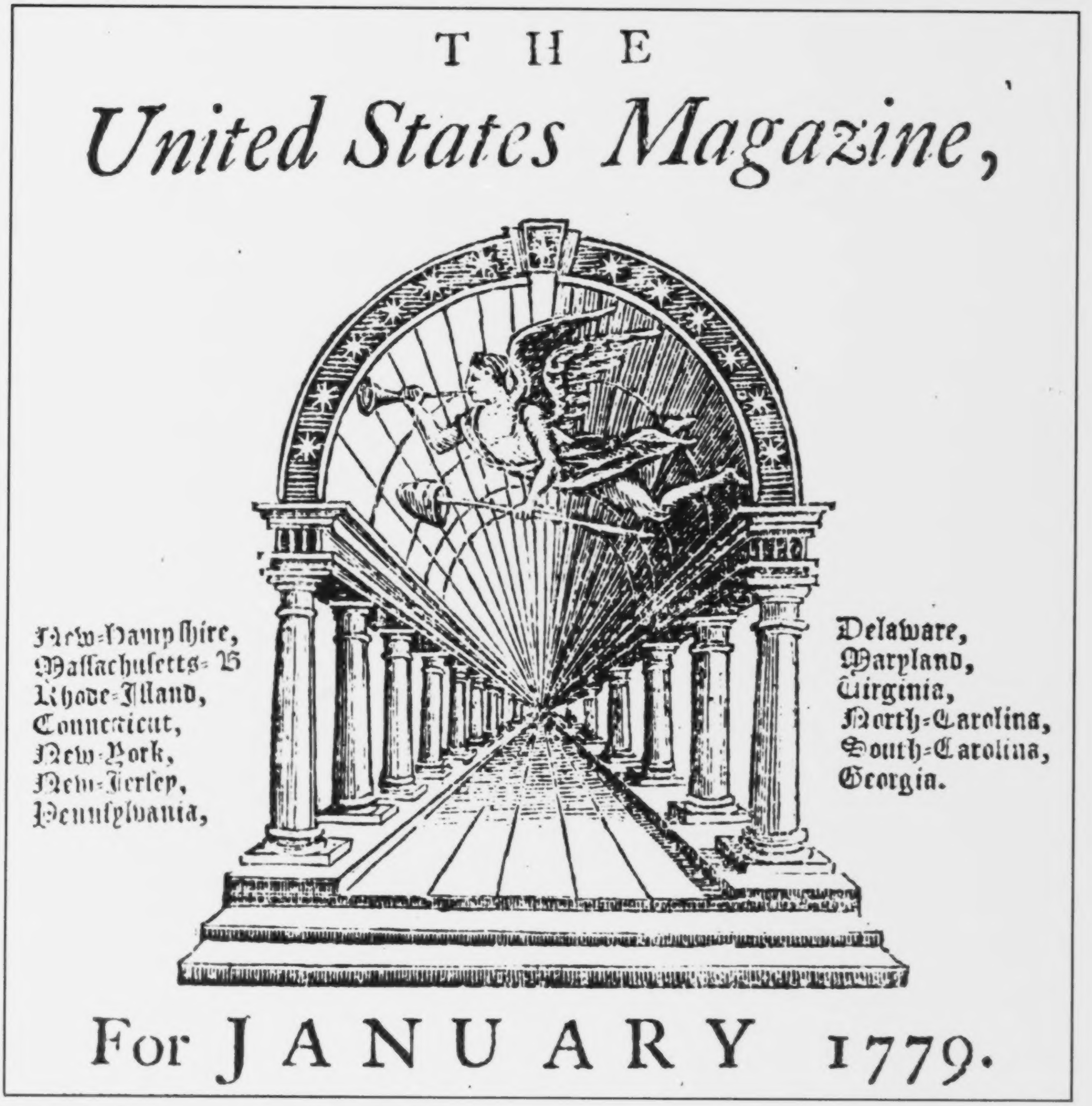
Developing the Lesson. Have students read the excerpts from *The Federalist*, numbers 47, 48. Check students' comprehension of main ideas in the reading assignment by requiring them to complete the exercise at the end of the two documents. Statements in item 3 that agree with Madison are: b and e.

Assign the excerpt from essay 51 as the next reading assignment.

Require students to complete the exercises at the end of this document as a check on their comprehension of main ideas in the reading.

Have students turn to the five exercises on the final pages of the lesson. Have students complete items 1–4 in preparation for a classroom discussion.

Concluding the Lesson. Conduct a classroom discussion on items 1–4 in the set of exercises at the end of the lesson. Require students to support or explain their answers by referring to pertinent parts of *The Federalist* 47, 48, and



THE

United States Magazine,

New-Hampſhire,
Maſſachuſetts-B
Rhode-Iſland,
Connecticut,
New-York,
New-Jerſey,
Pennſylvania,

Delaware,
Maryland,
Virginia,
North-Carolina,
South-Carolina,
Georgia.

For JANUARY 1779.

The United States Magazine, *January 1779. American Antiquarian Society.*

51. In general, ask students to give reasons for their answers and encourage students to challenge the answers and reasons of their peers whenever they think that insufficient justification has been provided for an answer.

Assign item 5 as the final activity of this lesson. Ask students to write a brief (no more than 500 words), cogent essay in response to this activity. Advise students to use these sources, at least, in writing this essay: *The Federalist*, the Constitution, and their textbooks in civics, government, and history.

Select two or three students to read their essays to the class. Assign other students the responsibility of making a formal response to one of the essays. Use the formal responses as stimulators of broader class discussion of ideas presented in the essays. Emphasize that the responses to the essays might be affirmative or critical or some combination of the two; or the responses might mainly introduce additional or alternative ideas into the discussion.

Discussions of items 1–5 should emphasize the interrelated civic values of limited government, the rule of law, and liberty under law as desired ends or goals of separation of powers as a basic principle of government in the Constitution.

NOTE: Other essays in *The Federalist* that include discussion of separation of powers, in combination with other topics, are numbers 9, 37, 49, 66, 75, and 78. Interested students might be referred to one or more of these essays.

Lesson:
Separation of Powers with Checks and Balances in *THE FEDERALIST*, Numbers 47, 48, 51

Separation of powers, a major principle of the Constitution, is the distribution of power among three branches of government: (1) the legislative, (2) the executive, and (3) the judicial. The legislative branch (Congress) has power, according to Article I of the Constitution, to make certain kinds of laws. In Article II, the Constitution says that the executive branch (headed by the President) has power to enforce or carry out laws. The judicial branch (headed by the Supreme Court) is established in Article III of the Constitution to interpret and apply the law in federal court cases.

The separation of power to make law, enforce law, and interpret law, among three branches of government, is a means to limited government. It prevents any person or group in the government from having enough power to become a tyrant and oppress the people.

However, Antifederalists criticized the Constitution, because it does not completely separate powers of government among the three branches. They pointed out, for example, that the president takes part in law-making through the veto, the chief executive's power to reject a law passed by Congress. Furthermore, the legislative branch is involved in the exercise of executive power through its power to approve the president's appointments of executive officials. These are merely two examples, of many, to show that the Constitution permits sharing of power among the three branches, which the critics said was a weakness.

James Madison responded to the critics by pointing to another principle of government in the Constitution, checks and balances, whereby each branch of the government has power to limit or check the actions of the others. In this manner, the primary goal of limited government is served. For example, the president can check the power of Congress with the veto. But the president's veto can be overturned by a subsequent ⅔ vote of Congress. This is one of several checks exercised by one branch over the others to keep the power of government balanced and limited. In combination, the principles of separation of powers and checks and balances provide a government of separated branches that share power. Thus, each separate branch of the government has some influence over the actions of the others, and no branch can exercise its duties without some cooperation from the others.

Hamilton and Madison replied in several essays of *The Federalist* to criticisms of the Constitution's provisions for separation of powers. Excerpts from three essays by Madison, numbers 47, 48, 51, are presented in this lesson. What is Madison's definition of separation of powers? How does Madison justify his definition?

NUMBER 47: MADISON

. . . One of the principal objections . . . to the Constitution is its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct. . . .

No political truth is certainly of greater intrinsic value. . . . The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. . . .

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. . . . [He] did not mean that these departments [three branches of government] ought to have no partial agency in, or no control over [checks of one branch on another] the acts of each other. His meaning . . . can amount to no more than this, that where the whole power to one department is exercised by the same hand, which possess the whole power of another department, the fundamental principles of a free constitution are subverted. . . .

[Montesquieu says] . . . "When the legislative and executive powers are united in the same person or body, there can be no liberty, because . . . the same monarch or senate . . . [might] enact tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor." Some of these reasons are more fully explained in other passages; but briefly stated . . . they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author [establish separation of powers among three branches of government, but also some sharing of powers to enable each branch to stop the others from having too much power].

If we look into the constitutions of the several States we find . . . there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. . . . [State constitutions follow the principle of separation of powers with checks and balances; each branch has some part in the duties and powers of the other branches].

. . . What I have wished to evince is that the charge brought against the proposed Constitution of violating the sacred maxim of free government is warranted neither by the real meaning annexed to that maxim by its author [Montesquieu], nor by the sense in which it has hitherto been understood in America [as exemplified in the constitutions of the several states of the United States]. This interesting subject will be resumed in the ensuing paper.

Publius

NUMBER 48: MADISON

. . . Unless these departments [three branches of government] be so far connected and blended as to give to each a constitutional control over the others [checks and balances], the degree of separation . . . essential to a free government . . . can never in practice be duly maintained.

It is agreed . . . that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess . . . an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectively restrained from passing the limits assigned to it. . . .

Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to the parchment barriers against the encroaching spirit of power?

. . . A mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

Publius

Reviewing Ideas in Essays 47 and 48

1. What is Madison's definition of separation of powers? (How is the related idea of checks and balances linked to separation of powers in Madison's definition?)

2. How is separation of powers with checks and balances connected to limited government and protection of individual rights and liberties?

3. Examine the following statements and decide which items agree or disagree with Madison's ideas. Make a checkmark next to each statement that agrees with Madison. Refer to essays 47 and 48 to explain and support your answers.

___ a. Separation of powers in the Constitution means that each branch of government is detached totally from the other branches in exercise of powers and duties.

___ b. Separation of powers in the Constitution involves sharing of duties and powers in government as a means to limited government.

___ c. The system of checks and balances in the Constitution interferes with and undermines separation of powers as a means to limited government.

___ d. Madison disagrees with the ideas of Montesquieu on separation of powers.

___ e. State governments in the United States practiced the principle of separation of powers as defined by Madison.

NUMBER 51: MADISON

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments [branches of government] as laid down in the Constitution? The only answer . . . is . . . by so contriving the interior structure of the government [designing a system of checks and balances] as that its several constituent parts may, by their mutual relations, be the means of keeping each other in the proper places. . . .

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means [checks and balances] and personal motives to resist encroachments of the others. The provision for defense must . . . be [suited] . . . to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions [design of a constitutional system of checks and balances].

This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.

These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State....

But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this ... is to divide the legislature into different branches [Senate and House of Representatives] and to render them, by different modes of election and different principles of action, as little connected with each other as [possible]. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require ... that it should be fortified. An absolute negative [veto power] on the legislature appears ... to be the natural defense with which the executive magistrate should be armed. [But this veto power could be misused if not checked in turn by the legislature.]

... In a single republic [unitary government] all the power ... is submitted to ... a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America [federal system of government], the power ... is first divided between two distinct governments [federal and state], and then the portion allotted to each subdivided among distinct and separate departments [three separate branches of government with checks and balances]. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself....

Publius

Reviewing Ideas in Essay 51

Would Madison have agreed with the statements below? Refer to essay 51 (and ideas in 47, 48) to explain answers.

1. Government officials elected freely by a majority vote of the people should be trusted to have all powers of government, unseparated and unchecked.
2. The main check or control on the power of government is active and intelligent participation of the people.

Examining Ideas on Separation of Powers

Refer to the preceding excerpts from *The Federalist* 47, 48, 51 to find ideas and information on which to base answers to the following questions. Be prepared to support answers with references to specific parts of these essays.

1. In *The Federalist* 47, Madison says: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." What does this statement say about the value of separation of powers? Do you agree with this statement? Explain.
2. Refer to Articles I, II, and III of the Constitution of the United States. a. Find at least three examples that show how the powers of government are separated among three distinct branches of government. b. Find at least three examples of sharing of powers among the three branches of government that show how the powers of the federal government are not completely separated. c. Does the structure of government in Articles I, II, and III of the Constitution fit Madison's definition of separation of powers? Explain.
3. In 1952 (*Youngstown Company v. Sawyer*), Supreme Court Justice Robert Jackson said: "While the Constitution diffuses power the better to secure liberty, it also contemplates that the practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Does this statement by Justice Jackson agree with Madison's view of separation of powers expressed in *The Federalist*? Explain.
4. In 1789, at the first session of Congress, several members wanted to add the following amendment to the Constitution: "The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed so that the legislative department shall never exercise the powers vested in the executive or judicial, nor the executive exercise the powers vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive departments." This proposed amendment to the Constitution was voted down in Congress. Does this proposed amendment agree with ideas on separation of powers favored by authors of *The Federalist*?
5. a. According to authors of *The Federalist*, what is the value of separation of powers as a principle of government in the Constitution of the United States? (What desirable or valued ends or goals are likely to be gained through separation of powers in government? What undesirable or negative ends or consequences are likely to be avoided through separation of powers in government?) b. Do you agree with the position of Madison in *The Federalist* about the definition and value of separation of powers as a basic principle of government in the Constitution?

Bicentennial Gazette

Recently Published Books About the Constitution

A list of books about the Constitution published or reprinted in 1986 or 1987 follows.

Adler, Mortimer. WE HOLD THESE TRUTHS: UNDERSTANDING THE IDEAS AND IDEALS OF THE CONSTITUTION. Macmillan Publishing Co., 1866 Third Ave., NY, NY 10022. 1987. $16.95.

Baker, Richard A. THE UNITED STATES SENATE. Krieger Publishing Co., P. O. Box 9542, Melbourne, FL 32902-9542.

Barbash, Fred. THE FOUNDING: A DRAMATIC ACCOUNT OF THE WRITING OF THE CONSTITUTION. Linden Press/Simon & Schuster, 1230 6th Ave., NY, NY 10020. 1987. 256 pp. $18.95.

Beeman, Richard, Botein Stephen and Carter, Edward C., II. BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY. University of North Carolina Press, P. O. Box 2288, Chapel Hill, NC 27514. 1987. 366 pp. $25.00 (hc); $8.95 (pb).

Berger, Raoul. FEDERALISM: THE FOUNDERS' DESIGN. University of Oklahoma Press, 1005 Asp Ave., Norman, OK 73019. 1987. 224 pp. $16.95.

Berns, Walter. TAKING THE CONSTITUTION SERIOUSLY. Simon & Schuster, 1230 6th Ave., NY, NY 10020. 1987. $19.95.

Bernstein, Richard B. with Kym S. Rice. ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION. Harvard University Press, 79 Garden St., Cambridge, MA 02138. 1987. $35 (hc); $14.95 (pap).

Bickel, Alexander M. THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS. Yale University Press, 92 A Yale Station, New Haven, CT 06520. 1986. 320 pp. $26.00 (hc); $10.25 (pb).

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Estreicher, Samuel and Sexton, John. REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS. Yale University Press, 92 A Yale Station, New Haven, CT 06520. 1986. 224 pp. $16.00.

Furlong, Patrick J. WE THE PEOPLE: INDIANA AND THE UNITED STATES CONSTITUTION. Indiana Historical Society, 315 W. Ohio St., Indianapolis, IN 46202.

Furtwangler, Albert. AMERICAN SILHOUETTES: RHETORICAL IDENTITIES OF THE FOUNDERS. Yale University Press, 92 A Yale Station, New Haven, CT 06520. 1987. 192 pp. $17.50.

Gerberg, Mort. THE U.S. CONSTITUTION FOR EVERYONE. Perigee Books, 200 Madison Avenue, NY, NY 10016. 1987. 64 pp. $4.95.

Goldwin, Robert A. and Kaufman, Art, eds. SEPARATION OF POWERS: DOES IT STILL WORK? American Enterprise Institute, 4720-A Boston Way, Lanham, MD 20706. 1986. 193 pp. $21.50 (hc); $11.00 (pb).

Greene, Jack P. PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1606–1788. University of Georgia Press, Athens, GA 30602. 1987. 288 pp. $30.00.

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Kraus, Laurence G. THE DEMOCRACY ISSUE: REFORM THROUGH THE CONSTITUTION. Rovi. 1987. 224 pp. $19.95 (hc); $9.95 (pb).

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Miller, William Lee. THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC. Knopf, 201 E. 50 St., NY, NY 10022. 1986. $24.95.

Morris, Richard B. THE FORGING OF THE UNION, 1781–1789. Harper & Row, 10 E. 53 St., NY, NY 10022. 1987. 416 pp. $22.95 (hc).

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Ferris, Robert G. and James H. Charleton. THE SIGNERS OF THE CONSTITUTION. Eastern National Park and Monument Association, 313 Walnut St., Philadelphia, PA 19106. 1986 [1976].

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Kurland, Philip B. and Ralph Lerner, eds. THE FOUNDERS' CONSTITUTION. 5 vol. University of Chicago Press, 11030 S. Langley Ave., Chicago, IL 60628. 1987. $300.00.

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CONSTITUTION. 4 vols. Macmillan Publishing Co., 1866 Third Ave., NY, NY 10022. $270.00. 1986.

THE LITTLE RED, WHITE AND BLUE BOOK. World Almanac, 200 Park Ave., NY, NY 10166. 1987.

McDonald, Forrest A. A CONSTITUTIONAL HISTORY OF THE UNITED STATES. Krieger Publishing Co., P. O. Box 9542, Melbourne, FL 32902-9542. 1986 [1982]. 316 pp.

Madison, James. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787. Norton, 500 Fifth Ave., NY, NY 10110. 1987 [1840].

Morris, Richard B. THE FRAMING OF THE FEDERAL CONSTITUTION. Eastern National Park and Monument Association, 313 Walnut St., Philadelphia, PA 19106. 111 pp. 1986. $4.75.

Ostrom, Vincent. THE POLITICAL THEORY OF A COMPOUND REPUBLIC: DESIGNING THE AMERICAN EXPERIMENT. University of Nebraska Press, 901 N. 17 St., Lincoln, NE 68588. 1987 [1971]. 240 pp.

Pole, J. R., ed. THE AMERICAN CONSTITUTION: FOR AND AGAINST. Hill & Wang, 19 Union Square W, NY, NY 10003. 1987. $19.95.

Preiss, Byron and Osterlund, David, eds. THE CONSTITUTION OF THE UNITED STATES OF AMERICA. Bantam Books, 666 Fifth Ave., NY, NY 10103. 1987.

Rodell, Fred. 55 MEN: THE STORY OF THE CONSTITUTION. Stackpole Books, Box 1831, Cameron & Kelker Sts., Harrisburg, PA 17105. 1986 [1937].

Rossiter, Clinton. 1787: THE GRAND CONVENTION. Norton, 500 Fifth Ave., NY, NY 10110. 1987 [1966].

Stansbury, Arthur J. ELEMENTARY CATECHISM OF THE CONSTITUTION OF THE UNITED STATES FOR USE OF SCHOOLS. American Heritage Press, 4225 Croydon, Camarillo CA 93010. 1987 [1828]. $4.48.

Van Doren, Carl. THE GREAT REHEARSAL: THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION OF THE UNITED STATES. Penguin, 40 W. 23 St., NY, NY 10010-5201. 1986. $6.95.

Yates, Robert. SECRET PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT PHILADELPHIA IN THE YEAR 1787 FOR THE PURPOSE OF FORMING THE CONSTITUTION OF THE UNITED STATES OF AMERICA. 1987 [1921]. Introduction by John Charles Armor. Birmingham Public Library, 2100 Park Place, Birmingham, AL 35203. 308 pp. $37.50 (hc); $17.00 (pb).

CHILDREN'S BOOKS

Agel, Jerome. YOUR CONSTITUTION—"A DEMOCRACY, IF WE CAN KEEP IT." Simon & Schuster, 1230 6th Ave., NY, NY 10020. 1987.

Anderson, Joan. 1787. Harcourt Brace Jovanovich, 757 Third Ave., NY, NY 10017. 1987. $14.95.

Batchelor, John E. STATES' RIGHTS. Franklin Watts, 387 Park Avenue S., NY, NY 10016. 1986. 72 pp. $9.40.

Faber, Doris and Faber, Harold. WE THE PEOPLE: THE STORY OF THE UNITED STATES CONSTITUTION OF 1787. Scribners, 597 Fifth Ave., NY, NY 10017. $13.95.

Feinberg, Barbara S. THE CONSTITUTION, YESTERDAY, TODAY AND TOMORROW. Scholastic, Inc., 2931 E. McCarty St., Jefferson City, Mo. 65101. 1987. 128 pp.

Fritz, Jean. SHH! WE'RE WRITING THE CONSTITUTION. Putnam, 200 Madison Ave., NY, NY 10016. $12.95 (hc); $5.95 (pap).

Hauptly, Denis J. A CONVENTION OF DELEGATES: THE CREATION OF THE CONSTITUTION. Atheneum, 597 Fifth Ave., NY, NY 10017. 1987. 160 pp. $12.95.

Hoobler, Dorothy & Hoobler, Thomas. THE RIGHT TO PRIVACY. Franklin Watts, 387 Park Avenue S., NY, NY 10016. 1986. 72 pp. $9.40.

Kleeberg, Irene C. SEPARATION OF CHURCH AND STATE. Franklin Watts, 387 Park Avenue S., NY, NY 10016. 1986. 72 pp. $9.40.

Levy, Elizabeth. IF YOU WERE THERE WHEN THEY SIGNED THE CONSTITUTION. Scholastic, 730 Broadway, NY, NY 10003. $2.50 (pap).

Lindop, Edmund. BIRTH OF THE CONSTITUTION. Enslow, Box 777, Hillside, NJ 07205.

Mabie, Margot. THE CONSTITUTION: REFLECTION OF A CHANGING NATION. Holt, Rinehart & Winston, 521 Fifth Ave., NY, NY 10175. 1987. $12.95.

McGee, Dorothy. FRAMERS OF THE CONSTITUTION. Dodd, Mead, 79 Madison Ave., NY, NY 10016. 1987 [1968]. 416 pp. $13.95.

Meltzer, Milton. AMERICAN REVOLUTIONARIES: A HISTORY IN THEIR OWN WORDS, 1750-1800. Thomas Y. Crowell, 10 E. 53 St., NY, NY 10022. 1987. $12.95.

Sgroi, Peter. THIS CONSTITUTION. Franklin Watts, 387 Park Avenue S., NY, NY 10016. 1986. 72 pp. $9.40.

Spier, Peter, WE THE PEOPLE: THE STORY OF THE CONSTITUTION. Doubleday, 245 Park Ave., NY, NY 10167. 1987.

Williams, Selma R. FIFTY-FIVE FATHERS. Dodd, Mead, 79 Madison Ave., NY, NY 10016. 1987 [1970]. 192 pp. $11.95 (hc); $4.95 (pb).

Woods, Geraldine H. THE RIGHT TO BEAR ARMS. Franklin Watts, 387 Park Avenue S., NY, NY 10016. 1986. 72 pp. $9.40.

Educational Resources

This listing includes selected print educational resources. A listing of media resources will appear in the Winter 1987 issue of ***this Constitution.***

"A CELEBRATION OF CITIZENSHIP." Packet of materials (elementary, middle, high school) to support a day-long "teach-in" on September 16, 1987. Available from ANPA, Box 17407 Dulles Airport, Washington, DC 20041. $3.00.

CONSTITUTION, a simulation of a convention called to revise the U.S. Constitution, by Charles L. Kennedy. Includes 35 one-page student guides and a 29-page teacher guide. Interact, P. O. Box 997E, Lakeside, CA 92040. $16.00.

THE CONSTITUTION. Monthly magazine. National Center for Constitutional Studies, P. O. Box 37110, Washington, DC 20013; (202) 371-0008.

THE CONSTITUTION: EVOLUTION OF A GOVERNMENT. Includes 34 facsimile documents, teacher's guide. Education Division, National Archives and Records Service, Washington, DC 20408; (202) 523-3347. Order from SIRS, Inc., Boca Raton, FL 33427. $35.00.

THE ECONOMIC WORLD OF 1787 AND THE CONSTITUTION, by Albert Alexander and Edward C. Prehn. 18 pp. New York City Council on Economic Education, Inc., 150 Nassau Street, Room 1625, New York, NY 10038.

HISTORIC DOCUMENTS and other memorabilia. HERITAGE ENTERPRISES, 325 N. Thirteenth St., Philadelphia, PA 19107-1118; (215) 627-4340.

THE JEFFERSON MEETING ON THE CONSTITUTION: THE CONSTITUTION IN THE CLASSROOM, A GUIDE FOR TEACHERS and THE JEFFERSON MEETING ON THE CONSTITUTION: THE CONSTITUTION IN THE COMMUNITY, A GUIDE FOR COMMUNITIES. Step-by-step instructions for holding Jefferson Meetings and a guide to resources. Six specific discussion guides are also available. $12 for all six discussion guides and either teacher or community guide. Jefferson Foundation, 1529 18th St. NW, Washington, DC 20036; (202) 234-3688.

LAW IN UNITED STATES HISTORY: A TEACHER RESOURCE MANUAL. New Mexico Law-Related Education Project. Includes 37 lessons for junior and senior high schools. Order from the Social Science Education Consortium, 855 Broadway, Boulder, CO 80302; (303) 492-8154.

LAW STUDIES, vol. 11, no. 2, Fall 1986. Special issue on the Constitution. New York State Bar Association. Bureau of Social Studies Education. New York State Education Department, Albany, NY 12234.

THE MINI PAGE by Betty Debnam. A weekly four-page tabloid newspaper supplement for children 6–12. A 20-part monthly series focusing on the Constitution began in March 1986, and a 40-part mini series began in September 1986 of short articles on key constitutional people and events. For information, write Andrews, McMeel & Parker, P. O. Box 419150, Kansas City, MO 64141.

MIRACLE AT PHILADELPHIA EXHIBITION AND EDUCATIONAL MATERIALS. Friends of Independence National Historical Park. Includes a map of Philadelphia in 1787, a booklet—"The Intellectual Heritage of the Constitutional Era" by Jack P. Greene, a modern newspaper account of April 2, 1987, a poster of the 55 delegates to the Convention, and a set of 55 delegate cards with portraits and biographical information. Teacher's packet with all items and additional material, $19.50. All items available separately. Eastern National Parks and Monuments Bookstore, 313 Walnut Street, Philadelphia, PA 19106; (800) 821-2903.

THE NEW FEDERALIST PAPERS. A series of newspaper columns written by scholars and political figures on the Constitution. Public Research Syndicated, 4650 Arrow Highway, Suite D-7, Montclair, CA 91763; (714) 621-5831.

RELIGIOUS FREEDOM IN AMERICA: A TEACHER'S GUIDE. Americans United Research Foundation, 900 Silver Spring Avenue, Silver Spring, MD 20910; (301) 588-2282. 108 pp. $2.00 for postage and handling.

SHAPING AMERICAN DEMOCRACY: U.S. SUPREME COURT DECISIONS. Ready reference to 54 Supreme Court decisions for teachers. Keyed to high school textbooks. Glossary. Law, Youth and Citizenship Program, New York State Bar Association, One Elk Street, Albany, NY 12207. 89 pp. $8.95.

SOLDIER-STATESMEN OF THE CONSTITUTION. Twenty-two biographical pamphlets on the signers of the Constitution who were also Revolutionary War veterans. U.S. Army Center of Military History, Office of the Secretary of the Army, Washington, DC 20310-0101. 8 pp.

TEACHING ABOUT AMERICAN FEDERAL DEMOCRACY, edited by Stephen L. Schecter. Center for the Study of Federalism. Gladfelter Hall, 10th floor, Temple University, Philadelphia, PA 19122.

TEACHING THE CONSTITUTION. 16-page catalog of educational materials (print, computer, video). Social Studies School Service, 10200 Jefferson Blvd., Dept. TCP, P.O. Box 802, Culver City, CA 90232-0802; (800) 421-4246.

TEACHING TODAY'S CONSTITUTION. Ten lessons that apply the Constitution to contemporary problems. Includes handouts. Grades 7-12. 114 pp. Written by Margaret E. Fisher; edited by the National Institute for Citizen Education in the Law. $17.95. Social Studies School Service, 10200 Jefferson Blvd., P.O. Box 802, Culver City, CA 90232; (800)421-4246.

UNLOCKING THE CONSTITUTION AND THE DECLARATION OF INDEPENDENCE by Robert M. Goldberg and Richard M. Haynes. Globe Book Company, 50 West 23rd Street, NY, NY 10010. Twenty-nine lessons divided into six units, plus a glossary. 140 pp.

WE THE PEOPLE . . . DO ORDAIN AND ESTABLISH THIS CONSTITUTION. . . . Secondary level student text: 31 lessons, documents, glossary, biographical notes. Sampler available. Center for Civic Education, 5146 Doulas Fir Road, Calabasas, CA 91302; (818) 340-9320.

Exemplary Teaching Units

INSTRUCTIONAL MODULES ON THE CONSTITUTIONAL PROCESS consists of five highly useful teaching units for elementary and secondary students with an action component allowing students to "sign" the Constitution. Available from the National Conference of Christians and Jews, 71 Fifth Ave., Suite 1100, New York, NY 10003.

ABOUT OUR CONSTITUTION is a unit produced by the National Education Association in cooperation with the National Council for the Social Studies. Available from the NEA, 1201 16th St., N.W., Washington, DC 20036-3290.

THE CONSTITUTION AND EARLY REPUBLIC is a teacher's guide and resource handbook designed for 5th grade social studies classes. Available from Ann Soldz, Fairfax County Public Schools, Lacey Instructional Center, 3705 Crest Drive, Annandale, VA 22003-1799.

LEARNING BASIC SKILLS WITH THE U.S. CONSTITUTION is a 32-page skillbook which uses a constitutional theme to practice reading, writing, spelling, and map/chart reading. Available from Weekly Reader, Field Publications, 245 Long Hill Road, Middletown, CT 06457.

MATERIALS FROM PROJECT '87

BICENTENNIAL ESSAYS ON THE CONSTITUTION, Herman Belz, editor. Eleven pamphlets on the history of the Constitution. American Historical Association, 400 A Street, SE, Washington, DC 20003. (202) 544-2424. $6.00 (includes postage). 45–90 pp. each.

THE BLESSINGS OF LIBERTY: A POSTER EXHIBIT. Twelve color posters which tell the story of the creation of the Constitution. Available unmounted or mounted on three free-standing cardboard kiosks. Project '87, 1527 New Hampshire Avenue, N.W., Washington, DC 20036; (202) 483-2512. $70 (unmounted); $110 (mounted). Prices include postage.

LESSONS ON THE CONSTITUTION: SUPPLEMENTS TO HIGH SCHOOL COURSES IN AMERICAN HISTORY, GOVERNMENT AND CIVICS by John Patrick and Richard Remy for Project '87. Contains sixty lessons, text of the Constitution, selected essays from *The Federalist*. Social Science Education Consortium, 855 Broadway, Boulder, CO 80302; (303) 492-8154. $19.50 (includes postage). 302 pp.

this Constitution, quarterly magazine. Essays and resources for the Bicentennial. Project '87, 1527 New Hampshire Avenue, N.W., Washington, DC 20026. Subscription price, 1987–88: $15.00.

THIS CONSTITUTION: OUR ENDURING LEGACY, introduction by James MacGregor Burns. A collection of twenty-one essays originally published in ***this Constitution,*** published by Project '87. Congressional Quarterly, Inc., Dept. 4H, 1414 22nd Street, N.W., Washington, DC 20037. $22.00 (includes postage). 348 pp.

PUBLICATIONS FROM THE SOCIAL STUDIES DEVELOPMENT CENTER

(available from SSDC, Suite 120, Indiana University, 2805 E. Tenth St., Bloomington, IN 47405; (812) 335-3838)

EDUCATION ON THE CONSTITUTION IN SECONDARY SCHOOLS: TEACHING STRATEGIES AND MATERIALS FOR THE BICENTENNIAL AND BEYOND by John J. Patrick, Richard C. Remy and Mary Jane Turner. Includes lessons, bibliography, and a guide to resources and materials. $12.00 (includes postage). 91 pp.

LESSONS ON THE FEDERALIST PAPERS: SUPPLEMENTS TO HIGH SCHOOL COURSES IN AMERICAN HISTORY, GOVERNMENT, AND CIVICS by John Patrick and Clair Keller. Includes ten lessons with materials for teachers and students, a selection of *Federalist* essays, and a selected bibliography. $12.00 (includes postage). 91 pp.

AMERICAN BAR ASSOCIATION PUBLICATIONS

(available from the Commission on Public Understanding About the Law, American Bar Association, 750 North Lake Shore Dr., Chicago, IL 60611. (312) 988-5726)

HELPING CHILDREN UNDERSTAND THE UNITED STATES CONSTITUTION, Minna S. Novick. A handbook of activities and resources for teaching children ages 5 through 12. Special Committee on Youth Education for Citizenship. 15 pp. $2.00.

PASSPORT TO LEGAL UNDERSTANDING. Newsletter on public education programs and materials. Published twice a year. Free.

SPEAKING AND WRITING TRUTH: COMMUNITY FORUMS ON THE FIRST AMENDMENT. Six scripts on First Amendment topics. $4.95.

THE U.S. CONSTITUTION BICENTENNIAL: A *WE THE PEOPLE* RESOURCE BOOK, Robert P. Doyle and Susan A. Burk (with the American Library Association). Includes activities, resource lists, publicity advice, book lists, audiovisual lists, play lists, a quiz, a chronology and a selection of quotes. 47 pp. $8.50 (includes 3 posters). Posters available separately for $3.00 each from ALA Graphics, 50 E. Huron St., Chicago, IL 60611.

UPDATE ON LAW-RELATED EDUCATION, published three times a year by the ABA Special Committee on Youth Education for Citizenship. Includes articles, Supreme Court decisions, classroom strategies, practical law. $10.50 per year. Special Bicentennial Packet: $16.50 (includes handling).

WE THE PEOPLE: A HANDBOOK ON COMMUNITY FORUMS ON THE CONSTITUTION. Contains community forum scripts and background legal memoranda. $10.00.

WE THE PEOPLE: PROGRAM PLANNING GUIDE FOR COMMUNITY FORUMS ON THE CONSTITUTION, Lucinda J. Peach, editor. Includes bibliographies of books and films. $5.00. 142 pp.

EXHIBITS

"We The People: Creating a New Nation, 1765–1820" Opens in Chicago

Opening September 12, 1987, "We The People" explores the lives of the founding fathers, as well as women, children, African Americans, Native Americans, and artisans; it will be the only major permanent exhibition in the Midwest dedicated to early American history. Five documents are showcased: a broadside of the Declaration of Independence; the first newspaper printing of the Constitution; first printings of the Bill of Rights, the Northwest Ordinance and the Treaty of Greenville. Other elements include artifacts, costumes, engravings, maps, pamphlets, newspapers, letters and other manuscripts, and examples of eighteenth-century craftsmanship. For further information, contact Pat Manthei, Chicago Historical Society, Clark Street at North Avenue, Chicago, IL 60614; (312) 642-4600, ext. 36.

"The American Experiment: Living with the Constitution" Exhibit at the National Archives

"The American Experiment: Living with the Constitution" opened on April 10 at the National Archives in Washington, D.C. The exhibit focuses on the ways in which the Constitution has been challenged and interpreted over the past 200 years. Three contemporary constitutional issues are highlighted: Who has the right to vote? What are the powers of the Commander-in Chief? What are the roles of the state and federal governments in school desegregation? The exhibit will include 247 documents, photographs, drawings, artifacts and three audiovisual viewing stations. Three featured documents are the Joint Resolution of Congress proposing the Fourteenth Amendment, the 1965 Voting Rights Act, and the War Powers Act of 1973. The final section of the exhibit offers a sampling of the more than five thousand amendments to the Constitution proposed to Congress but not adopted. Video selections include a 1943 official explanation for the internment of Japanese Americans, the Kennedy-Wallace confrontation in 1963, and a Johnson press conference in 1965. The video selections and photographs of some items are available from the Public Affairs Office, NARS, Washington, DC 20408; (202) 523-3099.

"Criticizing the Constitution" Exhibit at the Rosenbach Museum & Library

From September 15 to November 24, 1987, "Criticizing the Constitution" will trace the debate in the states that followed the adoption of the Constitution in Philadelphia. Among the items included will be George Washington's copy of James Monroe's *Observations on the Constitution*, a first edition of *The Federalist*, and two letters from James Madison at the end of his life reminiscing about the Constitutional Convention. For further information, write The Rosenbach Museum & Library, 2010 DeLancey Place, Philadelphia, PA 19103; (215) 732-1600.

"Soldier Statesmen of the Constitution" Exhibit at the Army Transportation Museum

The Bicentennial exhibit at the U.S. Army Transportation Museum, Fort Eustis, Virginia, will emphasize the importance of those individuals with military backgrounds who signed the Constitution. The exhibit will include portraits, flags, replicas and reproductions. For more information, write Director, U.S. Army Transportation Museum, Fort Eustis, VA 23604-5000.

"Life in Delaware in the 1780s" Celebrates Ratification

A new exhibit opened in March 1987 at the Old Town Hall Museum in Wilmington, recreating life in Delaware communities in the eighteenth century. Clothing, farm tools, furniture, pots and pans, medical instruments, and other items set in room displays show a farmer in Sussex County, a miller in Wilmington and a wealthy family in Kent County. A videotape on ratification concludes the exhibit. The exhibit will close in January. For further information, contact the Historical Society of Delaware, 505 Market Street Mall, Wilmington, DE 19801; (302) 655-7161.

Smithsonian Exhibits to Mark Bicentennial

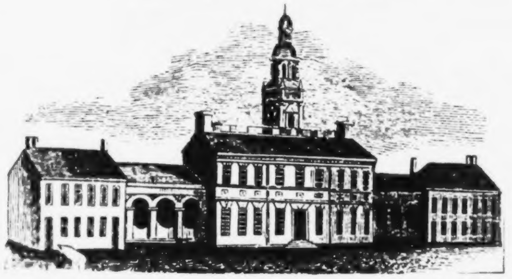
"A more Perfect Union: Japanese Americans and the United States Constitution" will open October 1, 1987 at the National Museum of American History. The exhibition will examine the constitutional guarantee of citizens' rights juxtaposed with the internment and relocation of thousands of Americans of Japanese ancestry during World War II. A controversial topic since the Roosevelt administration's decision, relocation continues to be a vital constitutional question because of pending litigation in U.S. courts. The exhibit will describe the political and military circumstances leading to the relocation orders; offer personal experiences and reactions of relocated Japanese Americans, and detail the legal ramifications of relocation and its impact on judicial attitudes toward other racial minorities.

In November 1987, "The Blessings of Liberty," also at the History Museum, will explore how the Constitution has been put into practice by means of American political institutions and through the political process. The exhibition will focus on formal government, the way in which the Constitution has been changed and broadened by amendments and legislation to include youth, women and minorities, and on informal practices, including the development of political parties and all that followed, from political campaigns and nominating conventions to TV debates.

The National Portrait Gallery will mount three exhibits. From October 9, 1987 to January 10, 1988, "American Colonial Portraits: 1700 to 1776" will be devoted to colonial portraiture, the first such exhibit since the 1930s. In March 1989, the Gallery will open "The First Federal Congress," an exhibition commemorating the Bicentenary of the First Congress. Finally, in October 1989, "Portraits of Distinguished American Jurists" will feature a selection of portraits of members of the court during the last two hundred years.

For further information, contact Susan Foster at (202) 357-3129 for the Museum of American History and Sandra Westin at (202) 357-2866 for the Portrait Gallery.

Constitution Day
September 17, 1987
Philadelphia, Pennsylvania



9 a.m. to noon: Grand Federal Procession—a reenactment of the massive parade in 1788 to celebrate the ratification of the Constitution by 10 states—followed by a Constitution Day Parade of the people, produced by Radio City Music Hall Productions.

Noon: Ceremony to commemorate Constitution Day
The President of the United States
The Chief Justice of the United States, retired
The Speaker of the House of Representatives
The President Pro Tempore of the Senate
State officials

Noon to Midnight: We the People Picnics
Entertainment

4 p.m.: Bell ringing in Philadelphia, nationally, and in 140 other countries to honor the signing of the Constitution.

9 p.m. to 11 p.m.: Live, nationally-televised two-hour tribute to the Constitution from Convention Hall in Philadelphia.

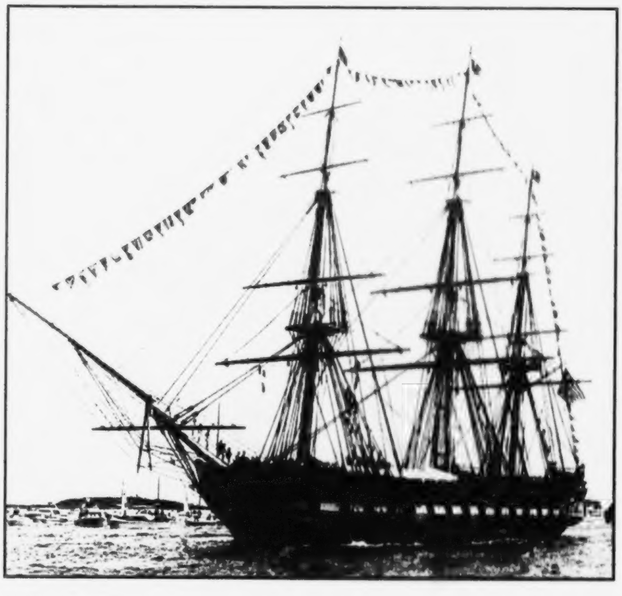
Merrill Lynch Underwrites Two National Bicentennial Programs

In 1987 and 1988, Merrill Lynch will support two major programs. "We the People," a four-part public television program produced in association with the American Bar Association and KQED, a public broadcasting station in San Francisco, California, will air in September 1987. Hosted by Peter Jennings, the hour-long segments will examine current events and constitutional issues. A companion volume will be available, and a six-week, 30-part series for National Public Radio will air simultaneously with the television series. In 1988, Merrill Lynch will sponsor "A Ratification Celebration," events to honor state government representatives and officials and education projects to promote citizen understanding of the Constitution. The first event was a ball on December 7, 1987 to honor the 200th anniversary of Delaware's ratification. For further information, contact James Flynn, Merrill Lynch, One Liberty Plaza, 165 Broadway, NY, NY 10080; (212) 637-5169.

USS Constitution Celebrates Bicentennial

The USS Constitution, launched in 1797 and the oldest commissioned ship in the Navy, will play a focal role in Boston's celebration of the U.S. Constitution's Bicentennial, September 17–20. During the weekend, the vessel will make two harbor cruises, and will host several functions.

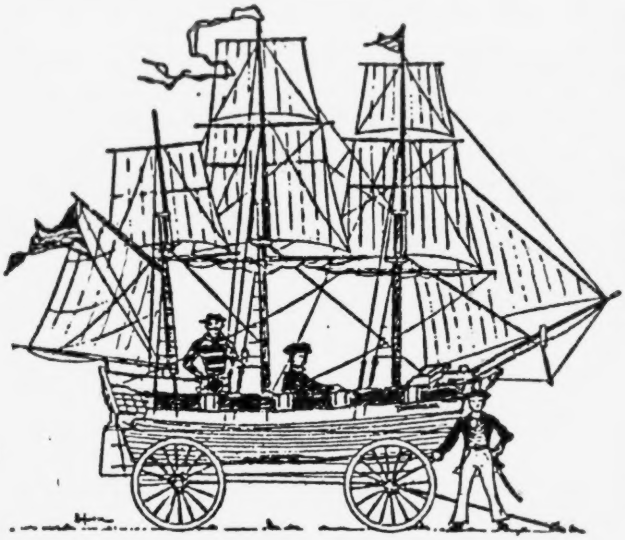
"Old Ironsides," as the ship is known, has a commanding officer at all times and its ensign is raised and lowered with the sun. Its Navy crew, in 19th-century dress, greets more than 600,000 visitors annually. It is open to the public every day from 9:30 a.m. to 3:50 p.m.



U.S.S. Constitution.

Maryland to Display Flagship

In commemoration of the 200th birthday of the Constitution, the state of Maryland, with the support of the Maryland Federalist Foundation, will build and display a replica of the Maryland *Federalist*, a fifteen-foot ship built for the 1788 parade to celebrate Maryland's ratification of the Constitution. Accompanied by educational exhibits and materials, the ship will tour for four years around the nation and state. For further information, write to the Maryland Office for the Bicentennial of the U.S. Constitution, 350 Rowe Boulevard, Annapolis, MD 21401; (301) 269-3914.



Federalist, a "ship of state" produced in 1788 for the parade to celebrate Maryland's ratification of the Constitution. The Maryland Federalist Foundation, Inc.

Bicentennial Leadership Project Hosts Workshops

Three regional Bicentennial Planning Workshops provided training and information to community and school leaders in Philadelphia, Los Angeles and New Orleans in 1986 and 1987. This first major activity of the two-year Bicentennial Leadership Project was designed to bring the commemoration of the Bicentennial to communities throughout the nation. In January, Bicentennial Leadership Awards went to the Los Angeles Unified School District, the University of California at Los Angeles Extension, the Constitutional Rights Foundation, the Claremont University Center Graduate School, the Junior Statesmen Foundation, the City of San Diego, Susan Burk of the ABA and Col. and Mrs. William Lambert of Nevada City, CA. Planning packets are available for $15. Send checks made out to the Council for the Advancement of Citizenship, One Dupont Circle NW, Suite 520, Washington, DC 20036.

"Constitution Quest: Why a Navy?"

In celebration of the Bicentennial of the Constitution, the Navy Museum and the National Portrait Gallery of the Smithsonian Institution have developed a joint program exploring the issue of establishing a navy as a constitutional question in the 18th century. Students use specially-developed educational materials in the classroom and then visit the Navy Museum and the National Portrait Gallery. For more information, write Naval Historical Center, Washington Navy Yard, Washington, DC 20374-0571; (202) 433-4882.

Great Decisions '87 Focuses on the Constitution

"Great Decisions," the largest nonpartisan foreign policy education program in the United States is focusing on the Constitution during 1987. The program is sponsored by the Foreign Policy Association. The 250,000 participants will read a 96-page briefing book examining foreign policy issues with special reference to constitutional principles. For more information, contact World Affairs Center, Inc., 1380 Asylum Avenue (rear), Hartford, Conn. 06105; (202) 236-5277.

State Historical Society of Iowa Produces *Goldfinch* for Children 9–12

Goldfinch, a quarterly magazine for children in grades 4 to 7, has published a special issue, "Constitutional Issues and Iowa." $1.50 from State Historical Society of Iowa, 402 Iowa Avenue, Iowa City, IA 52240; (319) 338-5471.

THE AMERICAN PUBLIC'S KNOWLEDGE OF THE U.S. CONSTITUTION: A NATIONAL SURVEY OF PUBLIC AWARENESS AND PERSONAL OPINION

In February 1987, the Hearst Corporation released a survey based on more than 1,000 telephone interviews of American adults, exploring understanding of the United States Constitution. Fifty-nine percent of those surveyed could not identify the Bill of Rights; 49 percent believed that the president can suspend the Constitution. However, 81 percent did know that it is unconstitutional to impose religious requirements on candidate for elective office. For further information, contact James F. O'Donnell, Director of Corporate Communications, The Hearst Corporation, 959 Eighth Avenue, NY, NY 10019; (212) 262-3363.

Constitution Hotline — 1-800-327-7683 (1-800-3BPROUD)

An "800" number, sponsored by the Historical Society of Pennsylvania and AT&T offers a different message each week about the adoption of the Constitution. The toll-free, nation-wide, twenty-four hour hotline also includes information about upcoming Bicentennial events. For more information, write: The Historical Society of Pennsylvania, 1300 Locust Street, Philadelphia, PA 19107.

Bill Moyers to Host Television Series for Students

Bill Moyers will host a unique film/video series—*The U.S. Constitution*—specially designed for use in junior and senior high school classes. The series of six 30-minute programs will be beamed by satellite and shown to students throughout the country.

In the documentary portion of each program, Moyers traces the history of one of six constitutional themes: "Limited Government and the Rule of Law," "Federalism," "Separation of Powers with Checks and Balances," "Freedom of Expression," "Equal Protection of the Laws," and "The Constitution and the Economy." Dramatic episodes involving young people lend relevance and immediacy to constitutional issues as they touch students' lives.

The U.S. Constitution, designed for years of use in American history, civics, and government classes, will be available in fall 1987. The series was developed by the Agency for Instructional Technology, Project '87, and a consortium of 29 state education agencies. A printed teacher's guide and related student materials help teachers prepare for the programs and involve students in discussion.

To preview *The U.S. Constitution* and to receive a list of states whose schools are eligible for special consortium prices, call AIT toll free at (800) 457-4509.

THE LAW OF TREASON AND THE CONSTITUTION—SEMINAR FOR HIGH SCHOOL TEACHERS OF AMERICAN HISTORY AND/OR SOCIAL SCIENCE
College Avenue Campus of Rutgers University
New Brunswick, NJ 08903
Sponsored by the New Jersey Committee for the Humanities in cooperation with Rutgers University
June 29 - July 23, 1987
Seminar Director: Thomas P. Slaughter, Rutgers University
For further information contact:
Ms. Miriam L. Murphy
Director, New Jersey Committee for the Humanities
73 Easton Avenue
New Brunswick, NJ 08903
(201) 932-7726/7120

THE CONSTITUTION: RELIGION AND CULTURE A BICENTENNIAL INQUIRY
Loyola College in Maryland
Baltimore, MD 21210
September 18–19, 1987
Principal speakers: Fr. Robert F. Drinan S.J., Georgetown University, "Church-State Relations in America's Third Century"; David Little, University of Virginia, "Conscience, Theology and the First Amendment"; Stanley Hauerwas, Duke University, "Freedom of Religion: A Subtle Temptation." For further information, contact Vigen Guroian or Bernard Nachbahr at Loyola.

CONCEPTUAL CHANGE AND THE CONSTITUTION OF THE UNITED STATES
Folger Institute Center for the History of British Political Thought Conference for the Study of Political Thought
April 16–18, 1987
Principal speakers: Gerald Stourzh, University of Vienna, "Constitution: Changing Meanings of the Term from the early 17th century to the late 18th century"; James Farr, University of Wisconsin-Madison, "Conceptual Change and Political Innovation: the View from 1787"; Peter S. Onuf, Worcester Polytechnic Institute, "Changing Meanings of the Word 'State' in the Making of the Constitution"; Garry Wills, Northwestern University, "The Changing Meaning of Sovereignty"; Terence Ball, University of Minnesota, "A Republic—If You Can Keep It"; Daniel Walker Howe, UCLA, "The Public Psychology of *The Federalist*"; Lance Banning, University of Kentucky/National Humanities Center, "Further Thoughts on 'Virtue' in Revolutionary Thinking"; Russell L. Hanson, University of Indiana, "Commons and Commonwealth: Democratic Republicanism as the New American Hybrid." For further information, contact: Patricia C. Kelly, Folger Institute, 201 E. Capitol St. SE, Washington, DC 20003

SYMPOSIUM ON INTERPRETING FEDERAL NEW YORK
Fraunces Tavern Museum
54 Pearl Street
New York, NY 10004-2429
May 1, 1987
Principal speakers: Richard Leffler, University of Wisconsin-Madison, "The Confederation, the Constitution, and the Bill of Rights: New York's Critical Role"; Paul A. Gilje, University of Oklahoma, "Mechanics in New York City in the Era of the Constitution"; Deborah Dependahl Waters, Museum of the City of New York, "The Fine and Decorative Arts of Federal New York"; David Shields, The Citadel, "Literary Culture and Dining Clubs in Federal New York." For further information, call (212) 425-1778.

CONFERENCE ON RATIFYING THE CONSTITUTION: IDEAS AND INTERESTS IN THE SEVERAL AMERICAN STATES
Research Triangle Park
North Carolina 27709
May 22–23, 1987
Sponsored by the National Humanities Center and the North Carolina Commission on the Bicentennial of the U.S. Constitution
Principal speakers: Gaspare Saladino, George Graham, Sara Shumer, Edward Cashin, Donald Lutz, Michael Gillespie, Peter Onuf, Robert Weir, Jean Yarbrough, Lance Banning, Stephen Schecter, Michael Lienesch, and John Kaminski.
For further information, contact:
Mona Frederick
National Humanities Center
7 Alexander Drive
Research Triangle Park, North Carolina 27709
(919) 549-0661

ON THE THEORY AND PRACTICE OF CONSTITUTIONAL GOVERNMENT: A BICENTENNIAL COLLOQUIUM

Paris, France
September 17–19, 1987
Sponsored by the American Enterprise Institute for Public Policy Research, Washington, D.C. and the University of Paris X, Nanterre, France

Principal speakers: Hilail Gildin, Queens College, City University of New York; Michel Troper, University of Paris X; Terence Marshall, University of Paris X; Jean-Luc Parodi, Fondation Nationale des Sciences Politiques; James Ceaser, University of Virginia; Olivier Duhamel, University of Paris X; Julien Feydy, University of Paris (Sorbonne); Robert A. Goldwin, American Enterprise Institute for Public Policy Research, Washington, D.C.; Antoine Lyon-Caen, University of Paris X; Walter Berns, Georgetown University.

For additional information, contact: Robert A. Goldwin
American Enterprise Institute
1150 17th Street, N.W.
Washington, D.C. 20036
(202)862-5912

CONFERENCE ON STATE CONSTITUTIONAL LAW IN THE THIRD CENTURY OF AMERICAN FEDERALISM: NEW DEVELOPMENTS AND POSSIBILITIES

Hotel Hershey
Broad & Locust Streets
Philadelphia, PA
March 15–17, 1987
Sponsored by the Center for the Study of Federalism, Temple University, in cooperation with the American Bar Association, the Philadelphia Bar Association and the United States Advisory Commission on Intergovernmental Relations.

Principal speakers: A. E. Dick Howard, University of Virginia; Donald S. Lutz, University of Houston; Lawrence Friedman, Stanford University; Hon. Stanley Mosk, Supreme Court of California; Earl Maltz, Rutgers University; Burt Neuborne, New York University; Ivo Duchacek, City University of New York; Richard Briffault, Columbia University; William Cohen, Stanford University; G. Alan Tarr, Rutgers University; Robert F. Williams, Rutgers University; Ronald K. L. Collins, University of Puget Sound; David Burnham, Washington, D.C.; Daniel J. Elazar, Temple University. Topics: The Role of State Constitutional Law in the American Federal System; The United States Constitution as an Incomplete Document; State Constitutions in Historical Perspective; The Emerging Agenda in State Constitutional Law; Federalism and the Protection of Individual Rights: A Symposium; State Constitutional Law in Comparative Perspective; State-Local Relations in State Constitutional Law; Economic Rights Under State Constitutions; Religion Under State Constitutions; Separation of Powers Under State Constitutions; Direct Democracy and State Constitutional Law; State Constitutions and the Problem of Privacy.

For more information, contact:
Ellis Katz
Program Coordinator
Center for the Study of Federalism
Temple University 025-25
Philadelphia, PA 19122

CONSTITUTION 200

Carl Vinson Institute of Government
University of Georgia
Athens, Georgia 30602

1987 Public Assemblies:
March 23: "The Role of the Supreme Court in our Constitutional Government." Tuscaloosa, Alabama
April 6: "Sovereign Nation or Sovereign States? Federalism in the Civil War Era and Today." Charleston, South Carolina
May 19: "Rule of Law or Rule of Men? The Problem of Separation of Powers." Atlanta, Georgia
For more information, call (404) 542-2736.

TEACHING THE CONSTITUTION

A symposium for school teachers and administrators
Smithsonian Institution
Office of Elementary and Secondary Education
Washington, DC 20560
May 16, 1987

Principal speakers: Maxwell Bloomfield, Catholic University; Marcus Cunliffe, George Washington University; James Horton, George Washington University; Steven Diner, George Mason University. Topics: "American Society and Constitutional Change"; "The Invention of the Presidency"; "Afro-American Perspectives on the Constitution." For further information, call (202) 357-3049.

A CONSTITUTIONAL BICENTENNIAL SUMMER

University of Maryland
College Park, MD 20742
July 22–23, 1987
July 28–29, 1987

Principal speakers: Carl F. Rowan, journalist, "Equality as a Constitutional Concept"; Arthur M. Schlesinger, Jr., City University of New York, "After the Imperial Presidency"; Archibald Cox, Harvard Law School, "The Role of the Supreme Court: Judicial Activism or Self-Restraint"; Sen. Charles McC. Mathias, Jr., "Original Intent and the Constitution." For further information, contact Whitman H. Ridgway, Department of History, University of Maryland; (301) 454-2843.

THE CONSTITUTION AND FOREIGN POLICY: A QUESTION OF CONTROL

MSC Wiley Lecture Series
Texas A&M University
College Station, TX 77844-9081
April 1, 1987

Principal speakers: Jeane J. Kirkpatrick, Edmund S. Muskie, Howard K. Smith. For further information, contact Kristen Phillips, (409) 845-7627.

WOMEN AND THE CONSTITUTION: A BICENTENNIAL PERSPECTIVE

Jimmy Carter Library
Carter Center, Emory University
Georgia State University
Atlanta, GA
February 10–12, 1988

Principal speakers: Justice Sandra Day O'Connor, Barbara Jordan, Geraldine Ferraro. For further information, contact Dayle Powell, Carter Center, Emory University, Atlanta, GA 30322.

INTERNATIONAL CONFERENCE ON THE CONSTITUTIONAL BASES OF POLITICAL AND SOCIAL CHANGE IN THE UNITED STATES OF AMERICA

The Hebrew University of Jerusalem
Jerusalem, Israel
May 18–20, 1987

For more information, contact:
Professor Shlomo Slonim
Chairman, Bicentennial Committee
Hebrew University
Jerusalem, Israel

SPECIAL ISSUES OF PERIODICALS

Scholastic Update, September 8, 1986, "How the U.S. Constitution Shapes Your World." (730 Broadway, NY, NY 10003-9538; $3.00)

Canadian Parliamentary Review, Spring 1987, "Canada and the Bicentennial of the American Constitution," (Box 950, Confederation Building, Ottawa, K1A OA6).

NEH Grants for Constitutional Projects, March 1987

THE JEFFERSON FOUNDATION $132,875

Funding was provided for a program of "Jefferson Meetings" for educators, attorneys, public officials, and other citizens to study and discuss the political thought and ideals of the framers of the Constitution, the way their thought and values shaped the design of the document, and the way that design affects our contemporary system of government. The grant will provide for a symposium for planners and organizers of the "Jefferson Meetings" and for study and discussion materials and support for some 40 to 50 meetings to be held around the country. Contact: William R. Merriman, Jr., The Jefferson Foundation, 1529 18th Street N.W., Washington, DC 20036; (202) 234-3688.

RIPON COLLEGE $8,757

This grant will support an examination of the historical, legal, political and philosophical implications of the "Free Soil" movement and its interpretation of the Constitution, particularly its anti-slavery element. The funding will provide for a two-day conference consisting of a reenactment of historic debates, a panel discussion, and a keynote address at the college, which is located in Ripon, Wis., site of important events in the history of the movement. Contact: Kimberly C. Shankman, Department of Politics and Government, Ripon College, Ripon, WI 54971; (414) 748-8197.

THE UNIVERSITY OF ALABAMA $180,533

Support was awarded for a two-year project that will study the theme of federalism and the historic role of the Constitution in southern life. The grant will provide for a public conference at the University of Alabama at which scholars will present papers, to be followed by eight local conferences in Alabama and Mississippi. The proceedings will be published in a special issue of the Alabama state historical magazine. Contact: Robert J. Norrell, Center for the Study of Southern History and Culture, University of Alabama, Tuscaloosa, AL 35487; (205) 348-7469.

UNIVERSITY OF CALIFORNIA AT SANTA BARBARA $43,213

Support was awarded for the second of a three-year series of lectures and public forums on the fundamental premises and history of American constitutional life. Funding was previously provided for the first year's activities. With this grant, three scholars in residence at the university will each deliver a paper, lead a seminar, and prepare a paper for publication on Constitutional issues related to the Civil War and Reconstruction era. The papers and transcripts of the seminars will be published in a university magazine. Contact: Donald J. McDonald, Center for the Study of Democratic Institutions, University of California, Santa Barbara, CA 93106; (805) 961-2611.

General Programs (February 1986; August 1986)

AMERICAN ENTERPRISE INSTITUTE
Washington, D.C. 20036
Project Director: Robert A. Goldwin
Award: $49,544
To support a series of three conferences and three books of essays on constitutional issues.

AMERICAN POLITICAL SCIENCE ASSOCIATION
Washington, D.C. 20036
Project Director: Sheilah Mann
Award: $175,000
To support publication and distribution during 1987 and 1988 of *this Constitution: A Bicentennial Chronicle.*

FLORIDA STATE UNIVERSITY
Tallahassee, FL 32306
Project Director: Leo Sandon
Award: $39,950
To support a three-day conference entitled "The Public Philosophy in a Pluralistic Society: Religion and State in the American Experience."

INDIANA UNIVERSITY ALUMNI ASSOCIATION
Bloomington, IN 47405
Project Director: Frank B. Jones
Award: $150,000
To support promotion of educational programs for the general public and a scholarly conference on the history and significance of the Northwest Ordinance to commemorate its Bicentennial.

PUBLIC RESEARCH SYNDICATED
Montclair, CA 91763
Project Director: James J. Barlow
Award: $50,000
To support the syndication of a series of newspaper articles commemorating the Bicentennial of the Constitution.

TEMPLE UNIVERSITY
Philadelphia, PA 19122
Project Director: Ellis Katz
Award: $74,982
To support research on American federalism and a three-day public conference in 1987 on state constitutional law with the participation of scholars in history, law, and political science; justices from state supreme courts; foreign jurists and scholars; and selected others. The proceedings will be published.

UNIVERSITY OF UTAH
Salt Lake City, UT 84112
Project Director: J.D. Williams
Award: $30,000
To support a ten-session lecture and debate series entitled "The Miracle of Philadelphia: The Constitution of the United States," led by distinguished historians, constitutional lawyers, and political scientists.

Humanities Federation Handbook Offers Plans for Local Projects

Celebrate the Constitution: A Guide for Public Programs in the Humanities, prepared by the Federation of State Humanities Councils with a $29,800 NEH grant, describes programs that can be organized by local civic organizations, schools, universities and libraries. The programs range from reading and discussion groups for the general public to seminars and conferences for educators and members of the legal profession.

The handbook complements NEH's "Bicentennial Bookshelf" program, which offered matching grants of $500 to help more than 800 public libraries in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands to buy reference books and other works on the Constitution. The programs outlined in the guide are designed to use the Bicentennial Bookshelf materials as the basis for study and discussion.

For each model the handbook includes a complete syllabus suggesting recommended readings, as well as planning and organization information.

An appendix lists constitutional scholars in each state to give program planners direction in choosing speakers and program leaders.

Besides being distributed to the libraries receiving Bicentennial Bookshelf grants, the guide will be sent to the 53 State Humanities Councils which compose the Federation. The councils will distribute copies of the handbook to civic and community groups in their states.

Copies of the guide may be purchased from the Federation for $6.00 per copy plus $1.50 for shipping and handling. For more information, contact the Federation of State Humanities Councils, 1012 14th St., N.W., Suite 207, Washington, DC 20005.

Federal Bicentennial Agenda

Bicentennial Information Center Opens; Offers Copies of Constitution, Calendars

The national Commission formally opened its Constitution Bicentennial Information Center in December 1986, a public resource center featuring Constitutional materials which can serve as a prototype for similar outlets across the nation.

The office—located at 1711 H Street, N.W., Washington, D.C. 20006—will attract the general public and provide needed exposure for both the Constitution and plans for the bicentennial commemoration. Visitors to the Center will be able to watch a video presentation about the Constitution and obtain brochures, pamphlets, fact sheets and other promotional material.

A small library of key reference book and periodicals are available for use at the Center and a computer terminal will be programmed to answer questions on Bicentennial programs and projects. The Center also includes a Speakers' Bureau which will coordinate and encourage speaking events at state and local levels.

Single complimentary copies of the official 1987 calendar of the Bicentennial Commission and pocket copies of the U.S. Constitution are available on request to the Information Center. Multiple copies are provided at cost. The calendars are priced at $1.50 each and the pocket Consitution copies are $.15 each. The Constitution is available only in amounts of 50 or more. Checks should be made payable to the Commission on the Bicentennial of the U.S. Constitution. For further information, telephone (202) 872-1787.

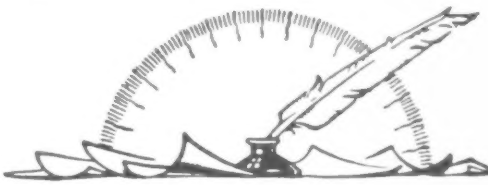
Commission on Bicentennial of the U.S. Constitution Given Two-Year Extension

The U.S. Congress has extended the life of the Commission on the Bicentennial of the United States Constitution two years, through December 31, 1991, to ensure that the 200th anniversary of the signing and ratification of the Bill of Rights is properly commemorated.

The original lesiglation—Public Law 98-101, passed in September 1983—gave the Commission a three-year lifespan, through December 31, 1989, to cover the anniversaries of the signing and ratification of the Constitution and the formation of the federal government. Those involved in the preparations for the Bicentennial observance worked on extending the Commission's life to include a commemoration of the creation of the first ten amendments—without which support for the new U.S. Constitution and federal government would have been difficult.

The Bill of Rights was sent to the states for ratification by Congress on September 25, 1789, and was ratified by the tenth state—Virginia—on December 15, 1791.

Another provision of the legislation increases the total amounts individuals and corporations may donate per year to the national Commission. Individuals are now allowed to give $250,000 instead of $25,000, and businesses can donate $1 million, up from $100,000.



Designated Bicentennial Communities

There are now over one thousand communities nationwide designated as "Bicentennial Communities" by the national Commission on the Bicentennial of the United States Constitution. In order to become a "Designated Bicentennial Community," the chief elected official and/or council must authorize a local committee to plan appropriate and meaningful activities to commemorate the Constitution and must then submit an application to the state Bicentennial Commission. Approval will then come from the national Commission.

The Bicentennial period goes from 1987 to 1991. Activities may include symposia and educational programs in the schools, parades and dedication of Constitution Malls and parks, as well as many other programs.

Further information is available from State/Local Affairs, Commission on the Bicentennial of the United States Constitution, 736 Jackson Place, NW, Washington, DC 20503; (202) 653-9808.

Bill of Rights Bicentennial in 1991

The editors of ***this Constitution*** would like to hear from organizations that are planning events to mark the Bicentennial of the Bill of Rights. Please send a brief description of the program and the name of a coordinator to contact for additional information to: Managing Editor, ***this Constitution***, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036

Bicentennial Commission Launches National Ad Council Promotion

The Commission on the Bicentennial of the United States Constitution and the Advertising Council launched a national public awareness campaign in February 1987. A series of print and broadcast advertisement created by Scali, McCabe and Sloves takes the theme "The Constitution, the Words We Live By." The Advertising Council is distributing the 30-second and 10-second broadcasts to over 900 television stations, all of the major networks and approximately 400 cable television outlets; they are narrated by Charlton Heston. The print ads go to magazines and newspapers. Viewers writing to "Constitution, Washington, DC 20599" receive a packet of information on the Constitution that includes a copy of the document, a map, a bibliography and biographical information on the framers.

State Bicentennial Commissions—Update

In issue no. 14 (Spring 1987) of ***this Constitution****, we listed state Bicentennial commissions in 45 states. The following have established commissions since then. Ed.*

ARKANSAS
Arkansas Constitution Bicentennial Commission
Lieutenant Governor's Office
State Capitol
Little Rock, AR 72201
501/371-2144
Chairman: Hon. Winston Bryant
Contact: Mike Ross
Bic. Coor.

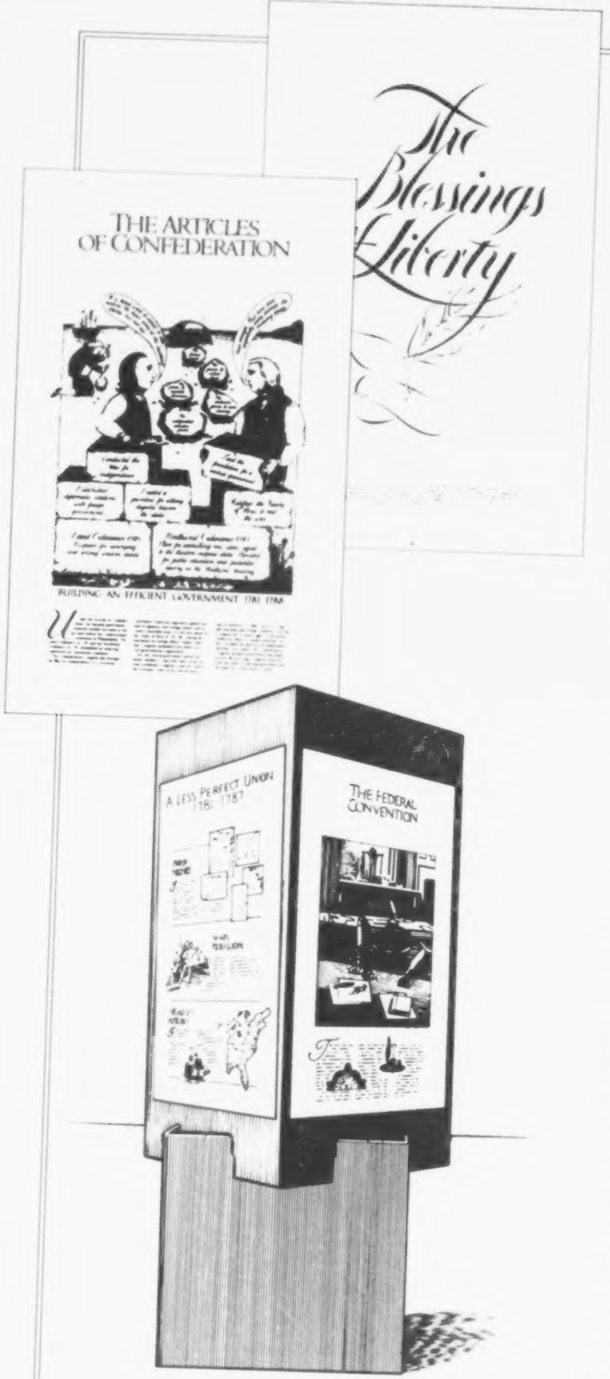
MISSISSIPPI
U.S. Constitution Bicentennial Commission of Mississippi
P.O. Box 139
Jackson, MS 39205
601/359-3100
Chairmen: Hon. William C. Keady, Hon. Connie Levi
Contact: Scott D. Fride
Proj. Coor.

NEBRASKA
U.S. Constitution Bicentennial Commission of Nebraska
Varner Hall, Room 219
3835 Holdrege Street
Lincoln, NE 68583
402/472-2111 x320
Chairman: Jack Schuetz
Contact: Julie Garay
Exec. Dir.

TENNESSEE
U.S. Constitution Bicentennial Commission of Tennessee
c/o Tennessee State Museum
505 Deaderick Street
Nashville, TN 37219
615/741-0825
Co-Chairmen: Hon. Harry W. Wellford
Hon. Douglas Henry
Contact: Mary Sewell
Staff Dir.

TEXAS
Texas Commission on the Bicentennial of the U.S. Constitution
P.O. Box 2066
Brownsville, TX 78520
512/548-2570
Chairman: Hon. Ricardo Hinojosa

VIRGIN ISLANDS
U.S. Constitution Bicentennial Commission of the Virgin Islands
Virgin Islands Humanities Council
P.O. Box 1829
St. Thomas, VI 00801
809/776-4044
Chairman: Dr. Roderick Moorehead
Contact: Sherry Simmons
Vice-Chairwoman


The Blessings of Liberty
THE ARTICLES OF CONFEDERATION
BUILDING AN EFFICIENT GOVERNMENT 1781-1788
A LESS PERFECT UNION 1781-1787
THE FEDERAL CONVENTION

FROM PROJECT '87…

Celebrate Your Constitution!

Celebrate THE BLESSINGS OF LIBERTY and the Bicentennial of the United States Constitution with a poster exhibit that tells the story of the American founding. The exhibit has received official recognition by the Commission on the Bicentennial of the United States Constitution.

These 12 full color posters, each 22"x36," attract the attention of viewers, who learn about constitutional principles through vivid graphics accentuated by brief, carefully crafted texts. THE BLESSINGS OF LIBERTY conveys information and inspires further inquiry.

The poster exhibit comes with a User's Guide, which features an essay describing the events, ideas and leaders pictured in the posters, separate lessons for students in grades 4-6, 7-9, and 10-12, and other essays and bibliographies.

The posters are available unmounted or on a sturdy cardboard mounting system 6' tall, charcoal gray, and foldable for reshipment. The poster exhibit can be displayed effectively in libraries, civic centers, businesses, schools or courthouses.

Exhibits are sold only in complete sets of twelve posters. Individual posters are not available for purchase.

PRICES:

UNMOUNTED: $70.00 per exhibit

MOUNTED: $110.00 per exhibit

ADDITIONAL COPIES OF THE USER'S GUIDE: $4.00 each

Additional shipping charges for orders sent to cities not served by UPS, Alaska, Hawaii, foreign countries, and APO & FPO according to distance and weight.

Poster Titles:
The Blessings of Liberty
The Articles of Confederation
A "Less Perfect" Union, 1781-1788
The Constitutional Convention
The Founders' Achievement
The Anti-Federalist Argument
Ratification
The Bill of Rights
A City Plan for the Constitution
The Principle of Federalism
The Supreme Law of the Land
To Ourselves and Our Posterity

— —

Orders must be prepaid; purchase orders will not be accepted. All orders should be sent and made payable to: Project '87 THE BLESSINGS OF LIBERTY, 1527 New Hampshire Ave., NW, Washington, D.C. 20036

	Quantity	Unit Price	Total
Unmounted Exhibits			
Mounted Exhibits			
Additional User's Guides			
		GRAND TOTAL	

SHIP TO:
Name__________
Organization__________
Address__________
City__________ State_____ Zip_____

this Constitution
Evaluation Questionnaire

this Constitution: A Bicentennial Chronicle has been published quarterly since 1983 with the support of a grant from the National Endowment for the Humanities. ***this Constitution*** is designed to serve the people who organize bicentennial programs and who teach civics, American history or government. Help us determine whether ***this Constitution*** has fulfilled this objective and served its intended audience. Please fill out and return this questionnaire.

1. How long have you been receiving ***this Constitution***?
   Since 1983 _____ 1984 _____ 1985 _____ 1986 _____
   Only in 1987–88 _____

2. Do you pay for your subscription to ***this Constitution***?
   Yes ___
   No ___

3. Please indicate the different sections of ***this Constitution*** that are useful to you.
   a. How often do you read each section of ***this Constitution***?

	Always	*Sometimes*	*Never*
• Feature articles	_____	_____	_____
• Documents articles	_____	_____	_____
• Classroom lessons	_____	_____	_____
• Gazette of information on Bicentennial activities	_____	_____	_____

   b. How useful is each section of ***this Constitution*** to you?

	Very Useful	*Somewhat Useful*	*Not Useful*
• Feature articles	_____	_____	_____
• Documents articles	_____	_____	_____
• Classroom lessons	_____	_____	_____
• Gazette of information on Bicentennial activities	_____	_____	_____

   c. Have you ever duplicated a feature from an issue of ***this Constitution*** for:
   - a meeting or workshop?
     Yes ___
     No ___
     If yes, please describe ______________________________
   - a newsletter or other publication?
     Yes ___
     No ___
     If yes, please describe ______________________________

   d. Do you share ***this Constitution*** with anyone?
   Yes ___
   No ___
   If "yes," with whom? ______________________________

   e. Have you ever used any activity or resource listed in ***this Constitution***?
   Yes ___
   No ___
   If yes, please describe ______________________________

   f. Have you ever used a reference in ***this Constitution*** to select a topic or a theme for a Bicentennial program?
   Yes ___
   No ___
   If yes, please describe ______________________________

4. Do you plan to keep your copies of ***this Constitution*** after the Bicentennial?
   Yes ___
   No ___

5. On the whole, do you consider this special publication a useful means of assisting people who are interested in being involved in a national commemoration?
   Yes ___
   No ___
   Please comment on your answer ______________________________

____

____

6. Comment on the *subjects* covered by ***this Constitution***. What topics were interesting? ______________________________

____

What other topics should have been covered? ______________________________

____

7. Finally, please tell us what type of organization you represent:
State or local Bicentennial Commission ____
State Humanities Council ____
State government ____
Public library ____
School library ____
State/County education agency ____
School
  Elementary ____
  Middle School ____
  High School ____
  College ____
Historical Society ____
Museum ____
Archives ____
Civic Association ____
Learned society ____
Other, please specify ______________________________

8. Are you involved in organizing a program or event for the Bicentennial of the Constitution?
Yes ___
No ___

Subscription Information
1987–1988

Subscriptions received by June 1, 1988 will include five issues, beginning with issue no. 14 (Spring, 1987) and ending with issue no. 18 (Spring, 1988). Publication of ***this Constitution*** will conclude with issue no. 18.

Individual copies of issue no. 13 (Winter, 1986) through issue no. 17 (Winter, 1987) can be purchased for $4.00 each. Issue no. 18 (Spring, 1988)— an expanded issue — can be purchased for $6.00. Issue nos. 1–12 are out of print.

Contact Project '87 for information on ordering 10 or more copies of one issue.

Orders must be prepaid; purchase orders cannot be accepted. All orders should be sent and made payable to: Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036, ATTN: Publications.

	Quantity	Unit Price	TOTAL
1987–88 Subscription (Issues 14–18):			
Individual		$15.00	
Institutional		$21.00	
Foreign Individual		$20.00	
Foreign Institutional		$26.00	
Single copies of issues 13, 14, 15, 16, 17 (circle issues you are ordering)		$ 4.00	
Single copy of issue no. 18		$ 6.00	

GRAND TOTAL: ____________

SHIP TO:

Name ______________________________
Address ______________________________
City ____________________ State ____________________ Zip ____________

The Federalist, No. 51

continued from inside front cover

If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution, it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.

First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizen, will be diminished; and consequently the stability and independence of some member of the government, the only other security, must be proportionally increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good, whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government. And happily for the *republican cause*, the practicable sphere may be carried to a very great extent by a judicious modification and mixture of the *federal principle*.

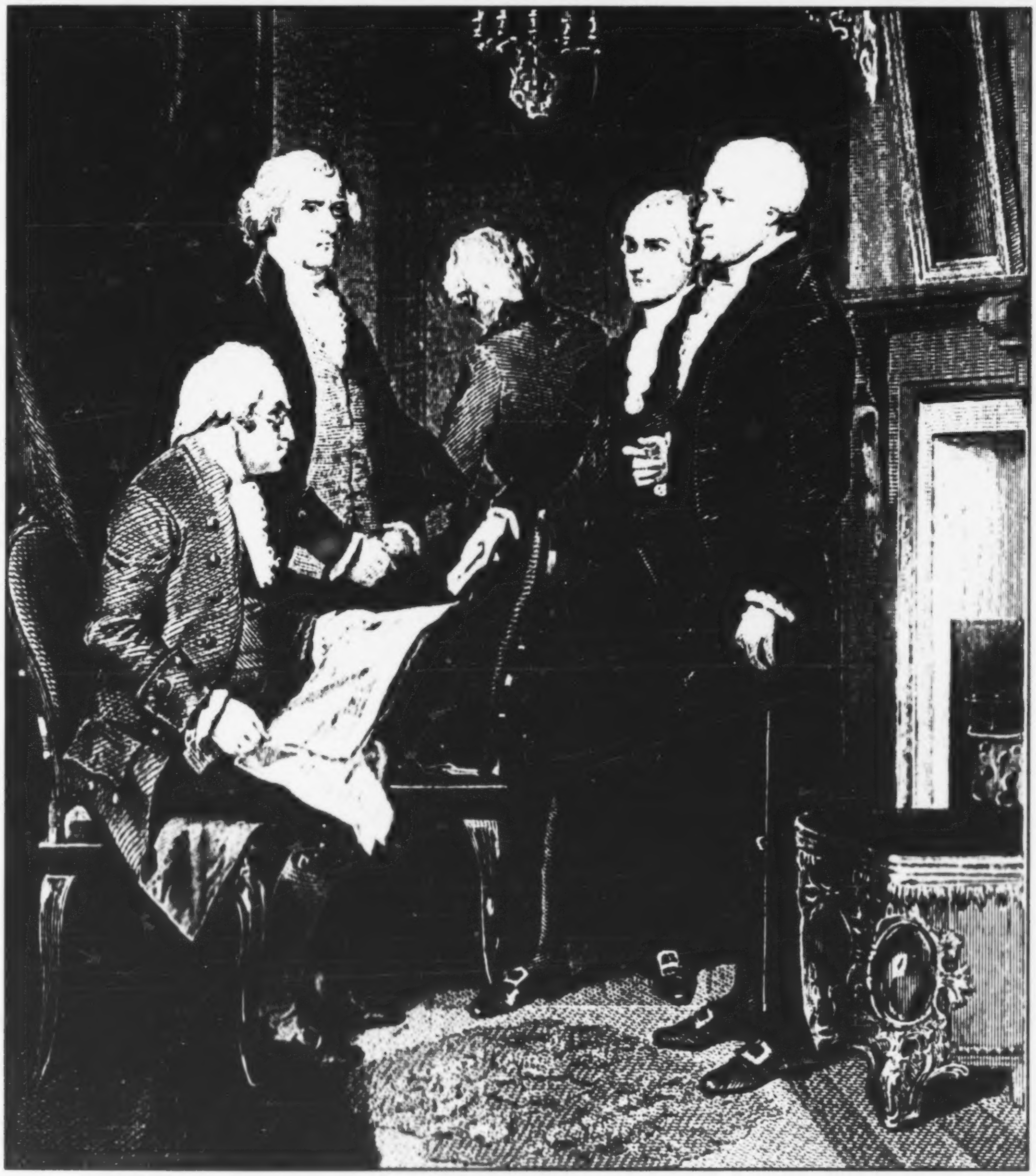
PUBLIUS

...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle Winter 1987. No.17



Project '87

Chronology of State Constitutions

by Paul Finkelman

Between 1776 and 1787, eleven of the thirteen newly independent states wrote new constitutions. Some of them wrote more than one constitution in this period. Two states—Connecticut and Rhode Island—used their colonial charters of 1662 and 1663 as their constitutions, deleting, however, all references to the British government and the King. Vermont, which would become the fourteenth state in 1791, wrote its constitution in 1777. The constitution-making of 1775 and 1776 set the stage for Independence; the constitution-making of 1775 through 1784 taught Americans much about self-government. In the summer of 1787 the delegates in Philadelphia were thus able to choose from a variety of constitutional models. The following chronology illustrates the important events in America's constitution-making era. At the beginning of the Civil War, Abraham Lincoln would use this series of events to support his argument that the Union predated both the Constitution and the states and that it therefore could not lawfully be dissolved.

May 16, 1775: The revolutionary government in *Massachusetts* asks Congress to authorize the drafting of a state constitution.

June 9, 1775: Congress urges *Massachusetts* to organize a legislature under the colonial charter.

July 19, 1775: Newly elected *Massachusetts* house of representatives meets. This is the first formally elected revolutionary state government. It is, however, elected under the old charter.

October 18, 1775: *New Hampshire* asks Congress to authorize a new constitution.

October 1775: *South Carolina* asks Congress to authorize a new constitution.

November 3, 1775: Congress directs *New Hampshire* to hold new elections and create a new government without any ties to the old colonial government or to Great Britain. Congress thus creates the first independent state in the nation and sets the stage for the Declaration of Independence eight months later.

November 4, 1775: Congress directs *South Carolina* to hold new elections and create a new government.

December 4, 1775: Congress directs *Virginia* to hold new elections and create a new government.

January 5, 1776: The *New Hampshire* legislature votes on a constitution for the state. This is the first state constitution to go into effect. Significantly, this constitution is passed by the legislature as if it were an ordinary law. There is no ratification process.

March 25, 1776: The *South Carolina* provisional congress, which has governed the state since the Revolution began, passes a provisional constitution to be in force until hostilities with Great Britain end. Like the constitution in New Hampshire, the South Carolina constitution is passed as if it were an ordinary law.

May 4, 1776: The *Rhode Island* general assembly resolves that the colonial charter is still in force but that all references to the King should be deleted. This charter will serve as the constitution of Rhode Island until 1842.

May 10, 1776: Congress advises colonists to create governments "where no government sufficient to the exigencies of their affairs has been hitherto established."

May 15, 1776: The Second Continental Congress resolves that "the exercise of every kind of authority under the said crown should be totally suppressed, and all the powers of government [should be] exerted under the authority of the people of the colonies, for the preservation of internal peace, virtue, and good order, as well as the defence of their lives, liberties, and properties."

June 7, 1776: Richard Henry Lee of Virginia introduces a resolution in the Continental Congress proposing that it declare independence.

June 15, 1776: The *Delaware* assembly, elected before the Revolution, asks all public officials to remain in office "in the name of the Government of the Counties of *Newcastle*, *Kent*, and *Sussex*, upon *Delaware*," and not "in the name of the King."

June 29, 1776: The *Virginia* provincial assembly passes a new constitution which includes the Virginia Declaration of Rights. Patrick Henry is immediately elected governor of the now independent state of Virginia.

July 2, 1776: The *New Jersey* provisional congress passes a new constitution which goes into effect immediately.

July 2, 1776: The Second Continental Congress, with only New York abstaining, votes in favor of independence from Britain and on July 4 approves the Declaration of Independence.

July 8, 1776: In response to the Continental Congress' May 15 resolution, revolutionary leaders in *Pennsylvania* hold an ad hoc election to choose delegates to a constitutional convention. Only men supporting the Revolution are allowed to vote in this election.

July 15, 1776: The *Pennsylvania* constitutional convention begins deliberations with ninety-six delegates present. All delegates are required to take an oath renouncing allegiance to England. Unlike future state constitutional conventions, Pennsylvania's was not called by any official or "legitimate" political body, delegates were not elected by all voters in the state, and the constitution went into effect without formal ratification. But as the first state convention specifically called for writing a constitution, it sets an important precedent.

July 27, 1776: The *Delaware* revolutionary assembly votes to hold elections for a convention to write a new constitution for the state. Only those who will swear an oath to support independence are allowed to vote.

September 21, 1776: The *Delaware* constitutional convention, borrowing heavily from the Pennsylvania con-

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...do ordain and establish
this Constitution
for the United States of America.

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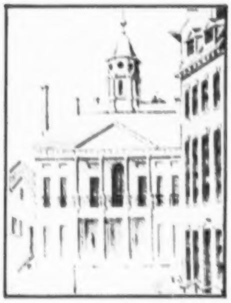
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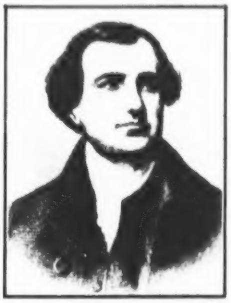
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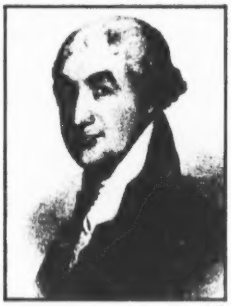
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Cover: *The First Cabinet*, engraving by Johnson, Wilson & Co. from an original painting by Chappel. 1874. Library of Congress.

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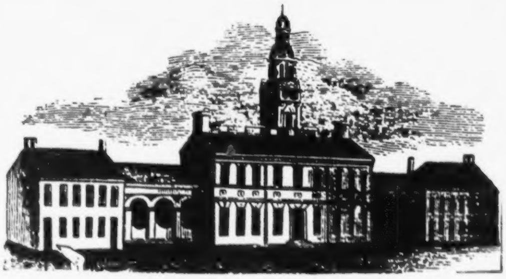

this Constitution

From the Editor

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In this issue, we take a special look at the ratification of the Constitution and the inauguration of the government under the new Constitution.

John P. Kaminiski narrates the course of ratification, using documents from that struggle. Many states ratified making it clear at the same time that they expected their concerns to be met promptly by amendments to the new constitution.

As the first branch of government, delineated by the framers in Article I of the Constitution, Congress assumed the chief burden of reassuring the states that the new federal government would be accountable, deliberative and responsive. Some members of the First Congress worried about its effectiveness, getting off, as it did, to a late start. But, as Joel Silbey describes, Congress soon organized itself and established norms for the conduct of the nation's business. The First Congress sent the Bill of Rights to the states and enacted crucial laws, including those setting up the "Great Departments" of the Executive branch, outlined in Article II of the Constitution. Richard Baker discusses the early workings of these Executive departments and the relationship of the department heads with each other and with the president.

Article III of the Constitution specifically created the Supreme Court, but it left the "inferior Courts" to Congress to elaborate. Congress met that obligation with the Judiciary Act of 1789, which is examined in an article by David Eisenberg, Christine R. Jordan, Maeva Marcus and Emily F. Van Tassel.

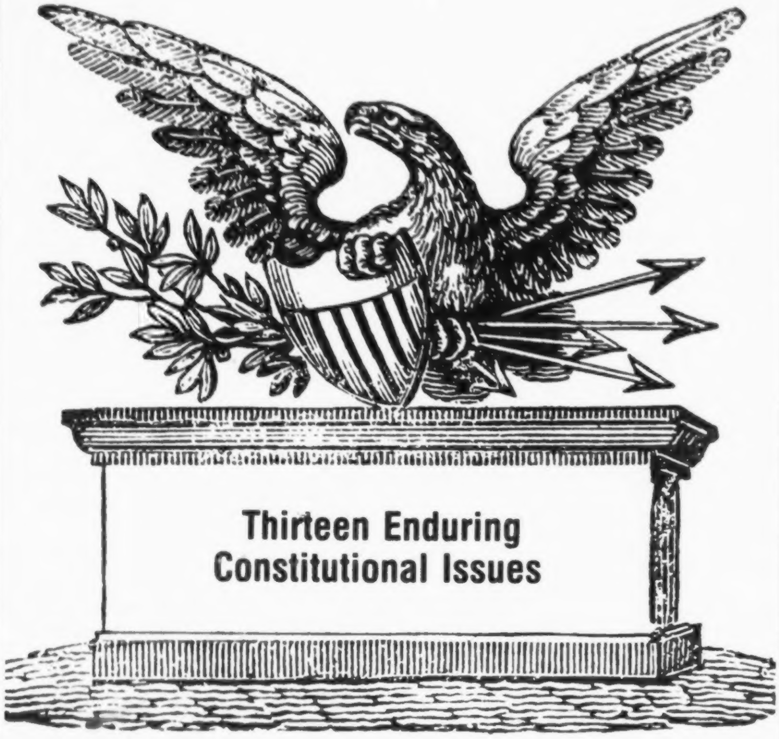
While the experiment in federal government was taking place, the states were conducting constitutional experiments of their own, as they continue to do to this day. A. E. Dick Howard takes a look at the history of state constitutions and their role in the system of constitutional government. A chronology, by Paul Finkelman, of the first state constitutions begins on the inside front cover and highlights the reciprocal relationship between state constitutions and national governance.

The interpretation of the intention of the framers has been one of the most enduring questions in American history. Ellen Nore offers a view of one of the most well-known scholars of the history of the Constitution, Charles A. Beard, whose thesis about the economic interests of the founders has provoked debate among historians for decades. Walter Murphy provides a syllabus that guides a class or a reading discussion group through a discussion of the meaning of the Constitution and how one might interpret it.

A special feature of the "Bicentennial Gazette" is a list of scripts, touring shows, video, and audio presentations on the Constitution, many of them available for educational use.

this Constitution first appeared in the fall of 1983. In 1984, it began publication on a quarterly schedule. This issue is the last for 1987; one more will appear in 1988, our final number, which will be published in June.

Correction: The quotation from George Washington that appeared on the cover of the last issue was found for Project '87 by Joan R. Challinor. The editors regret a typographical error that resulted in an incorrect identification.



Thirteen Enduring Constitutional Issues

- National Power—Limits and Potential
- Federalism—the Balance between Nation and State
- The Judiciary—Interpreter of the Constitution or Shaper of Public Policy
- Civil Liberties—the Balance between Government and the Individual
- Criminal Penalties—Rights of the Accused and Protection of the Community
- Equality—its Definition as a Constitutional Value
- The Rights of Women Under the Constitution
- The Rights of Ethnic and Racial Groups Under the Constitution
- Presidential Power in Wartime and in Foreign Affairs
- The Separation of Powers and the Capacity to Govern
- Avenues of Representation
- Property Rights and Economic Policy
- Constitutional Change and Flexibility

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"Our Successors Will Have an Easier Task": The First Congress Under the Constitution, 1789–1791

by JOEL H. SILBEY

The First Congress under the Constitution got off to a late start. Scheduled to meet on March 4, 1789, in New York City, the temporary national capital, on that date no quorum was present in either house. As a result, no business could be transacted; moreover, the eight senators (of 22) and thirteen representatives (of 59) who were there at the scheduled time had a long wait. The House did not achieve a quorum until April 1; five days later, on the sixth, the twelfth senator, Richard Henry Lee of Virginia, finally arrived to form the necessary majority of that chamber.

The month-long delay was hardly an auspicious beginning, even allowing for the difficulties of travel, late elections in some states and unresolved contests for some seats in others. It strongly recalled the dilatoriness, inattention, and what Congressman Fisher Ames referred to as "the languour of the old confederation" which the new government was to replace. Nevertheless, once it settled down to work, this first Congress found its feet and accomplished an enormous amount. In its three sessions, from April, 1789 to March 1791, it established the foundations of the new government, addressed some of the ambiguities in the Constitution, and set the whole republican experiment on its permanent course. The Constitution had left a great deal unsaid or unclear about the nature of the new government. The First Congress provided the initial opportunity to put flesh on bare bones. The men sitting in New York took up the heavy task successfully. They were guided by the notion, in the words of one of their number, "that it is proper for the legislature to speak their sense upon those points on which the Constitution is silent."

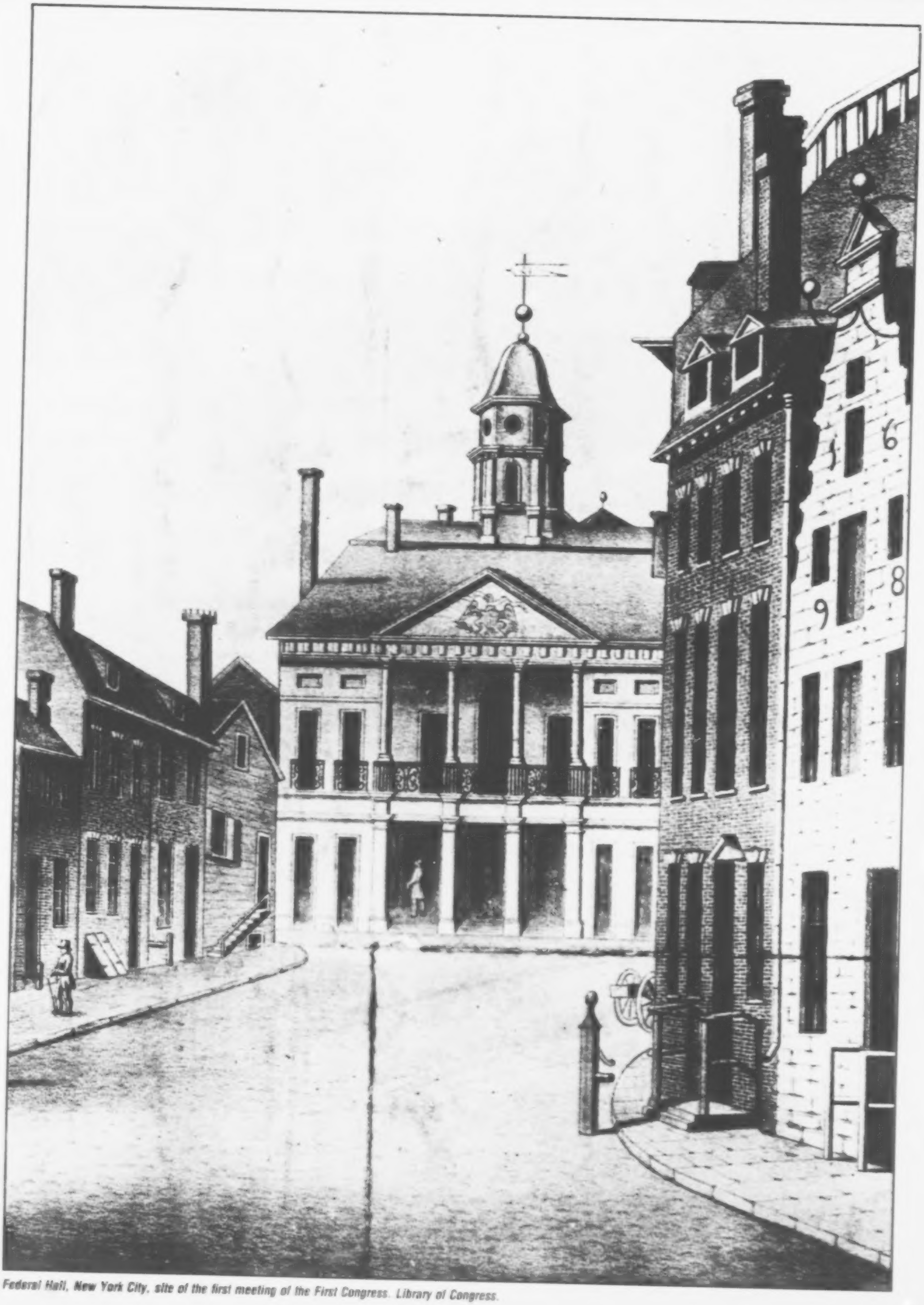
Organizing

Most of the members of the First Congress were not strangers to the rigors of legislative life in their raw, new country. As was to be expected, they were members of the ruling social and political elites of their day. Either they had inherited high social status and wealth, or they had made their way significantly up the social ladder on their own. Lawyers, planters, land speculators and merchants, many were graduates of the most prestigious colonial colleges and British universities. Schooled in the English parliamentary tradition, several had served in their state legislatures and in the Continental Congress. Twenty had participated in the Federal Convention, several in the state ratifying conventions; half of them had been politically active in the revolutionary period. Among them were two future presidents as well as many who would shape the political world during the next decade and more. Fisher Ames, Elbridge Gerry and Rufus King sat with James Madison in the House, while Robert Morris and James Monroe joined past and future in the Senate. As Fisher Ames summed them up, there were "few shining geniuses ... many who have experience, the virtues of the heart, and the habits of business." It would be "quite a republican assembly. It looks like one. Many who expected a Roman Senate ... will be disappointed."

Ideologically, the members of Congress were almost of one mind. Most had been supporters of the Constitution and had helped in the ratification struggles in their states over the past two years. The Constitution's opponents, the Anti-Federalists, were few in number. This did not prevent great controversy since definitions of the nature of the republic and the powers of the government varied among the pro-Constitution forces as events in this first Congress amply demonstrated. But, at the outset at least, there was general good will and a hope that all would contribute effectively to the success of the new government.

Despite the cold and damp of a New York City spring, once settled in Congress got down to business without fuss. "There is the most punctual attendance of the members at the hour of meeting," Massachusetts' Fisher Ames wrote, "Three or four have had leave of absence, but every other member actually attends daily, till the hour of adjourning. There is less party spirit, less of the acrimony of pride when disappointed of success, less personality, less intrigue, cabal, management or cunning than I ever saw in a public assembly." The businesslike, conscientious behavior remained. The rest did not. Congress moved very slowly at first owing to the newness of its situation, and "the novelty and complexity of the subjects of Legislation." Its members were, Madison pointed out to Thomas Jefferson, "in a wilderness without a single footstep to guide us. Our successors will have an easier task."

A chronology of Congress' activities from 1789 to 1791 suggests the variety and range of the matters covered. In the first session, it was inevitable that congressmen would be preoccupied by definition and institution building. Each house's first action was to read and file its own credentials and inform the other that it was organized. This operation was followed by a joint meeting in the Senate Chamber to open and count the electoral votes for President and Vice President. Shortly after the winners were notified, John Adams arrived to preside



Federal Hall, New York City, site of the first meeting of the First Congress. Library of Congress.

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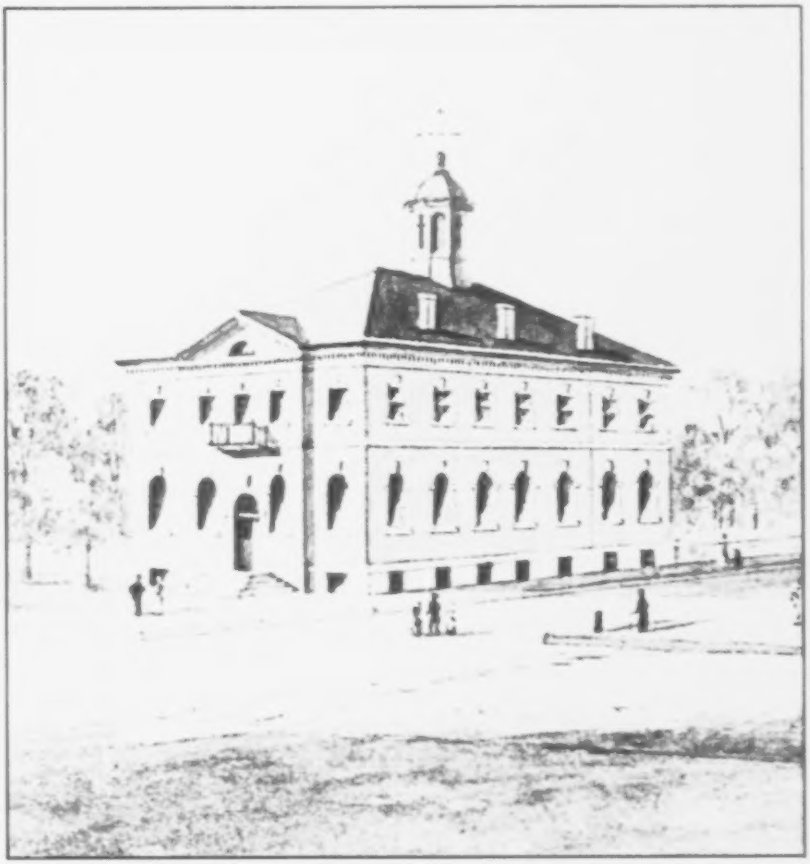


Courthouse at Sixth and Chestnut Streets, Philadelphia, to which the First Congress moved in 1790. The Historical Society of Pennsylvania.

over the Senate as Vice President on April 21. On April 1, the House had elected Frederick Muhlenberg, of a prominent Pennsylvania family, as its first Speaker. George Washington arrived two days after Adams, took the oath of office on April 30 and delivered his inaugural address in the gallery in front of the Senate Chamber.

As Congress began to sort itself out in these spring months, each house elaborated sets of internal rules of procedure to guide it through its daily business. The two houses drew upon the precedents of either Britain's House of Commons or the colonial assemblies or the state legislatures in which members had earlier served. The major locus of activity became each chamber's Committee of the Whole House on the State of the Union. It was there that the principles, directions and boundaries of the legislative agenda were established. After a member requested permission to introduce a bill, and such was given, the subject was debated in the Committee of the Whole. Bills were then sent to special committees for final drafting into refined language reflecting the previous debates. There were only two standing subject committees in the First Congress: the Committee on Elections, and a Committee on Enrolled Bills; the rest were ad hoc.

Before and after the daily sessions, these committees, then as now the life-blood of legislative activity, met to advance the legislative business before them. Early on, certain people were viewed as experts in particular subject areas and they usually were appointed to the relevant committees. Oliver Ellsworth of Connecticut, one of the acknowledged legislative activists, for example, served on 22 committees in the first session, and 36 in the second, compared to an average of 11 for all senators. Robert Morris and Richard Henry Lee were other active committee members in these years. Committees did not stay out long. The select committee on the Bill of Rights, chaired by James Madison, was appointed on July 21, 1789, and reported exactly a week later, on the 28th. Finally, there were conference committees that had to be appointed when the two houses disagreed on the wording of a bill as frequently happened in the First Congress.

Defining Relationships

What Congress had to do was clear enough. After organizing itself and settling its procedures, a vast array of business confronted the members. The matters to be dealt with ranged from the symbolic to the substantive. In the first instance, such concerns involved defining relationships. What titles shall there be in the new Republic? What shall be the meaning of the appointing powers of President and Congress? What shall be the relationship between executive departments and Congress? Is one house superior to the other; does each have a distinctive role? From the vantage point of two hundred years, much of this seems remote to important matters; other aspects anticipate themes still present in the 1980s.

The long debate over titles clearly had substantive implications. The Senate wanted the president to be called, "His Highness the President of the United States, and Protector of the Rights of the Same." The House demurred and the first congressional conference committee ever appointed had to deal with this issue. The Senate's aggressive presiding officer, John Adams, made his position clear: without such titles there would be an important lack of dignity and respect for their new republican institutions. To the House of Representatives the question was one of violating the essentials of republican simplicity. The whole thing was not worked out

The Constitution had left a great deal unsaid or unclear about the nature of the new government. The First Congress provided the initial opportunity to put flesh on bare bones.

until the Senate agreed to go along with the House's referral of the chief executive as just "Mr. President."

In a similar vein, the members engaged in long debates over how to treat each other, the procedures for receiving messages from each other, and how the president was to be received when he came to give his annual report on the State of the Union. Finally, there was debate over whether the president would be mentioned in the enacting clause of the bills passed. These matters clearly echoed practices of the English Parliament, with its Address from the throne and the formal response to it, and the English constitutional position that their governing authority was the "King in Parliament" so that both warranted mention in legislation.

Congress omitted mention of the president in its bills, but that one decision could not clarify the still ambiguous relationship between the chief executive and the national legislature. Madison had few qualms about the relationship at the outset. "In our government," he said, it was "less necessary to guard against the abuse in the Executive Department . . . because it is not the stronger branch of the system, but the weaker."

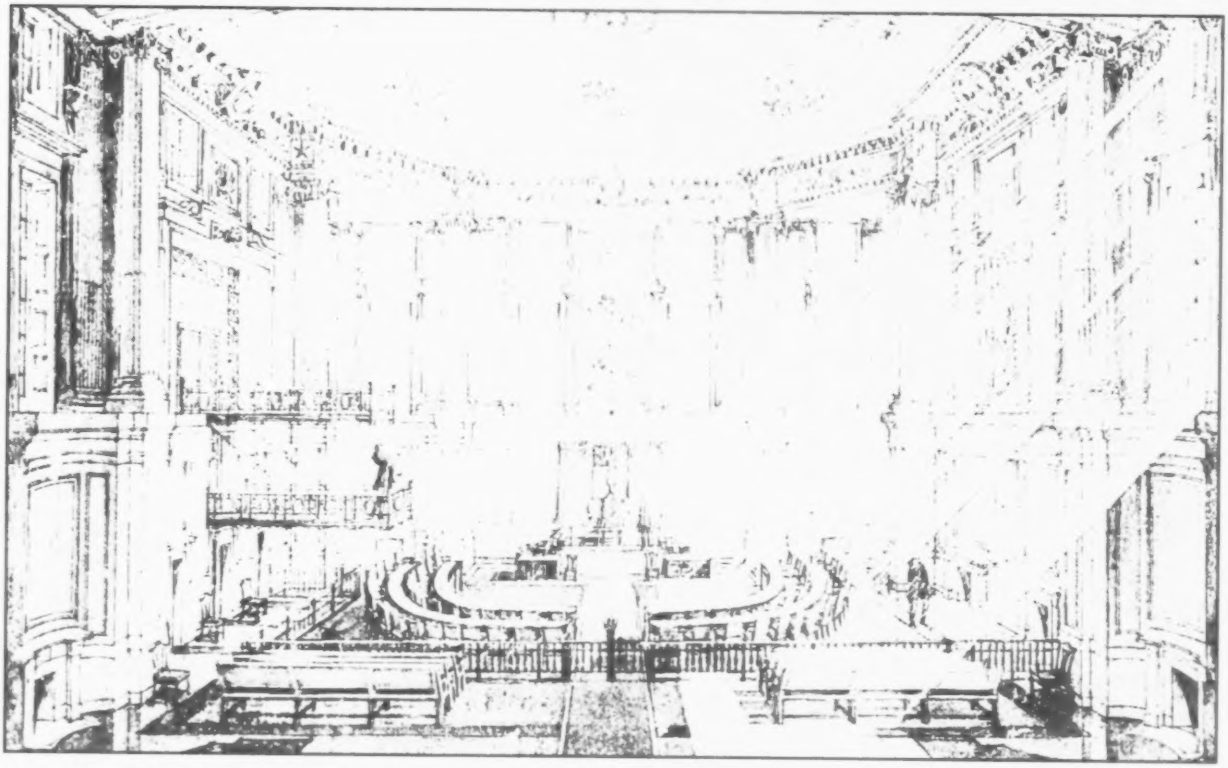
Nevertheless, Washington's attempt to negotiate directly with the Senate over an Indian Treaty provoked great tensions and fears. The treaty negotiations and drafting were primarily the President's responsibilities. He determined to include the Senate in them as well, taking a broad view of that body's constitutional duty to advise and consent to treaties. But, as Washington viewed it, the Senate's response was not helpful. He appeared in the Senate chamber on a warm August day in 1789 to be met with much silence and some hostility. A number of senators felt that he was out of place. Their historical memories of the long years of conflict between the English King and Parliament, particularly the former's efforts to bend the legislature to his will, and of the battles between the colonial governors and their legislative assemblies, remained strong. The president wished in this instance, one senator claimed, "to bear down our deliberations with his personal authority and presence. Form only will be left to us." Such men were determined to protect legislative independence from the executive, especially against any indications of pressure on their considerations.

This attempt at face to face discussion in the Senate chamber was awkward. Washington did not repeat it. Rather, written communications between the executive and legislative branches became the established procedure. But the president was not passive in using the Senate as a consultive body in foreign and military affairs when and as he saw fit to do so. He wrote frequently to ask advice before treaties were finalized. The Senate responded more freely than it had when he came in person but always remained somewhat distant and cautious toward his requests.

President Washington also consulted congressmen directly about appointments to executive office, willingly receiving from them suggestions of both acceptable and unacceptable appointees. That procedure worked well. One matter that became contentious involved the constitutional provision that the Senate advise and consent to individual executive appointments. Did such responsibility carry with it the implication that senators also had to agree when the president wished to remove someone they had previously approved? Some senators claimed that they had this right. Washington strongly demurred, arguing that such a process would effectively prevent him from carrying on the government with people of his own choosing. For a time, a vigorous debate developed, presaging a later controversy in the Reconstruction era when Congress impeached President Andrew Johnson over the same dispute—whether or not he could remove an official from office without the Senate's consent. This particular debate in the first Congress petered out as only a few senators chose to try to make an issue of their right to advise on removals. But the argument, together with several similar ones, reveals a great deal about the uncertain powers of the different branches of the government caused by often ambiguous constitutional provisions, as well as the tendency of some congressmen to be defensive about their own powers and suspicious of the president's intentions.

Legislation

In addition to these definitional and status problems, Congress began to consider and pass an enormous amount of substantive legislation. Here, perhaps, lies much of the importance of this First Congress (although its members would have argued that their wrestling with definitions, procedures and limits on power were just as critical for the future). On May 19, 1789, for example, Representative James Madison moved the creation of a Department of Foreign Affairs, one of Treasury, and one of War. Later, several other bills, including those to create the offices of Attorney General, Postmaster General, Superintendent of the Land Office, the Governor of the Northwest Territory, were also introduced. There



Interior of the House Chamber in Federal Hall, New York City. Library of Congress.

was an attempt to add to the list a Home Department, concerned with a range of administrative duties, patent and copyright registration, the census, etc. Most of these subsequently wound up in the Department of Foreign Affairs, renamed with the broader title of Department of State. Congress also passed the Judiciary Act of 1789, establishing a federal court system, detailing federal judicial procedures, and recognizing the power of judicial review over legislation enacted by Congress.

All of these bills passed by the summer and early fall of 1789. They elaborated the structure of the federal government rapidly and effectively, creating the foundations on which the execution of national authority rested thereafter. It was a notable achievement especially for the House of Representatives which held the initiative in these early days and did most of the work. During its three sessions the First House of Representatives considered 142 different bills (other than private ones, introduced by individual members for some limited or special purpose), the Senate only 24. In the first session, the Senate originated only the Judiciary Act. As a result, the irascible Senator William Maclay of New Hampshire complained in his journal of his chamber's comparative idleness.

At the center of this activity was the acknowledged floor leader and administration spokesman in the House of Representatives, the "Father of the Constitution," James Madison of Virginia. Fisher Ames said of Madison that he "speaks low, his person is little and ordinary." But his physical stature did not limit his imagination or effectiveness, first as the leader of the constitutional forces, then as the close confidant of Washington, and, later, as the emerging leader of the anti-administration group in Congress. Among the first representatives to arrive for the first session, he quickly began that round of activities that led him at one point to be engaged not only in shaping legislation and caucusing to work out compromises, but also in writing messages to himself as he drafted both the House's response to the President's Address and the President's reply to that response—not to mention parts of the original Address itself. He was a busy man.

Madison was also one of the central participants in the two other major areas of legislative activity in this Congress beyond the establishment of the government itself. He worked vigorously to undercut opposition to the new government by moving early to incorporate changes and clarifications in the Constitution. He took a campaign promise he had made seriously and pressured the House to take up the amendments to the Constitution he had fashioned out of the several hundred suggestions made by state ratifying conventions and local political meetings. Almost all of these suggestions sought limits on the power of the central government, many in favor of individual rights. Madison reduced the number of suggestions, 17 of which he shepherded through the House of Representatives. The Senate reduced these further to 12 (largely by combining several) which were submitted to the states where ten were finally ratified as the Bill of Rights. (The two that were not ratified limited congressmen's ability to raise their own salaries and set stringent restrictions on the apportionment of seats in the House.)

This major achievement of the First Congress passed with some

The United States was a pluralist society of many groups with different, and often conflicting, economic interests. These different economic groups and regional interests now faced each other over the shape and impact of national economic policy.

angry debate but relatively little opposition. Most congressmen accepted the need to reassure those still suspicious of any expansion of central government power. Madison and others believed that the rights enumerated in these amendments already clearly existed and did not need to be spelled out as constitutional provisions. But they accepted the amendments' need in political terms, as part of the legitimating reassurances necessary to bolster support for the federal government and its activities. This massive affirmation of personal liberties against government power, in short, passed largely due to political calculations and requirements—things that do not lessen the amendments' importance but places their passage into perspective as a specific part of the nation building agenda dominating this Congress.

Economic Policy

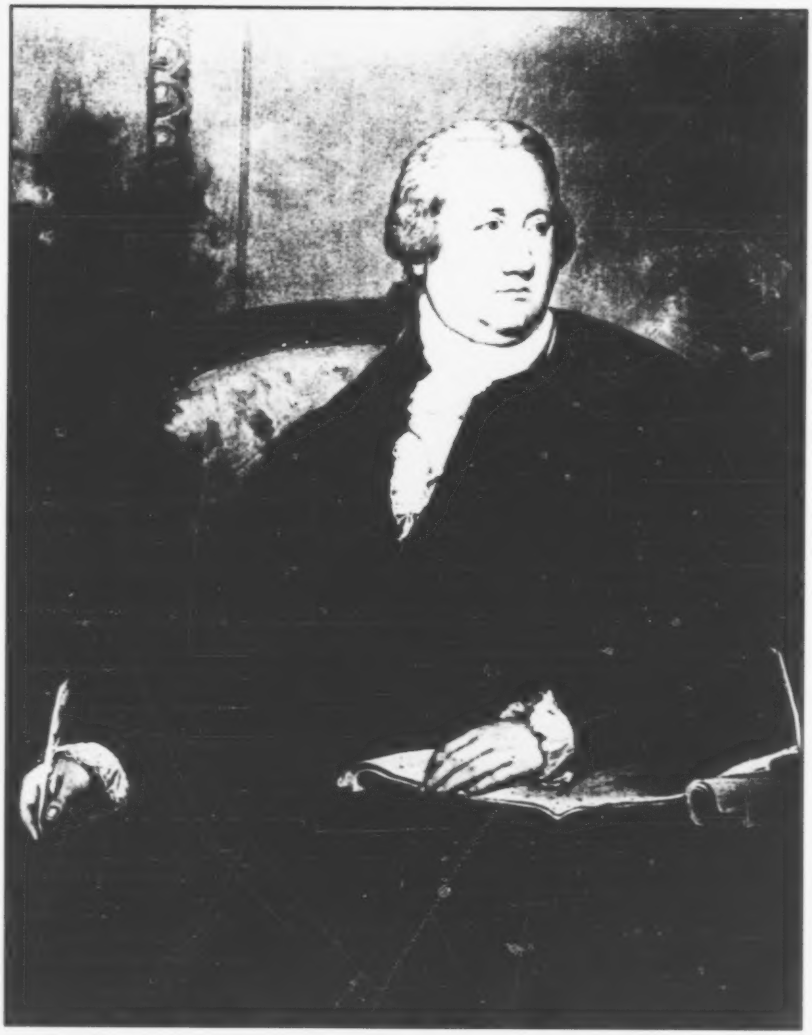
The most contentious area of legislative activity in these years involved economic policy, especially the wide-ranging program aggressively pushed by Secretary of the Treasury Alexander Hamilton. The Hamiltonian program was designed to give the federal government authority to raise revenue, regulate commerce and establish national authority in the economic sphere more clearly than had been the case earlier. James Madison was deeply involved from the first, originally throwing his support behind notions of building up national economic strength. Before long, however, he moved into opposition to the ambitious goals of Hamilton, creating an era of conflict in Congress different from its early, harmonious, days.

Discussion began quietly enough. In the first session, in the spring of 1789, Madison brought onto the floor a tariff bill and a bill to regulate foreign trade, and he then began to formulate plans for an excise tax bill, all designed either to raise revenue for the new government or to establish its role in external trade relations. Some of these programs provoked opposition by economic groups negatively affected by particular tariff rates or unhappy with other specific provisions they considered detrimental to their economic well being. Madison worked assiduously and successfully to meet objections by amendment and compromise, to build coalitions, and to shepherd the whole package through. By the end of the first session, in late September 1789, Congress had given the federal government a number of important revenue resources to help it operate.

Hamilton was more concerned, however, with domestic economic matters. He detailed his program in January 1790 in his *Report on Public Credit*, drafted at Congress' direction. Hamilton's recommendations included the funding of the national debt, the federal government's assumption of the outstanding state debts (to permit the accumulation of development capital), and the establishment of a national bank to carry on directly the federal government's financial activities and to regulate indirectly the general economy. Eventually, Congress adopted most of Hamilton's program. Some of it Madison supported, some of it went through in the form of legislative compromises fashioned between Madison and the administration. The most famous of these bargains was the agreement by the Virginian and his colleagues to support the assumption of state debts in return for the establishment of the national capital on the Potomac—a choice Washington and other Southerners very much wanted but which New York and Pennsylvania congressmen strongly opposed. Hamilton benefited from the powerful impulse at work to make the new government successful, to find means to bring people together, to compromise different points of view, all hallmarks of this Congress in its early months. As Senator William Smith of South Carolina put it, "Much harmony, politeness and good humor" characterized this assembly. Madison and other nationalists had a great stake in making the new system work.

But, as bill followed bill to carry out Hamilton's program, another legacy of this Congress emerged: stable political alignments. Opposition to Hamilton grew stronger and more bitter, finally including Madison and Secretary of State Thomas Jefferson as well. Both broke with the Washington administration over the reach of this national economic agenda. As their resistance developed, the congressional arena became more divided than it had ever been and more angry. Fisher Ames referred to the second session from January to August 1790, when much of this controversy began to develop, as "a dreadful one" with its "discord of opinions", and "labyrinth" of intrigues, cross pressures, anger and division.

In fact, real policy differences existed and so political matters provoked conflict. The United States was a pluralist society of many groups with different, and often antagonistic, economic interests. These different economic groups and regional interests now faced each other over the shape and impact of national economic policy. The internal economic rivalries within the nation were appearing on the floor of the First Congress as they had appeared during the time of the Articles of Confederation. Further, and critically, there were



Frederick Muhlenberg, *first Speaker of the House of Representatives. Collection of the Architect of the Capitol, Library of Congress.*

strong indications that this contentiousness was more than temporary since it reflected not only the local, sectional and regional economic differences endemic in the American republic but also basic ideological differences over the role, purpose and extent of the powers of the national government.

The battles over the Hamiltonian program proved deep and searing. It had become apparent, to everyone's great relief, that the dangerous sectional divisions of the earlier years had not intensified. As Madison noted to Jefferson, "members from the same State, or the same part of the Union are as often separated on questions from each other, as they are united in opposition to other States or other quarters of the Continent." At first, too, voting blocs were very volatile, swiftly changing from issue to issue. But as time passed and the controversy over the Hamiltonian program sharpened and deepened, several distinct lines of cleavage became noticeable in Congress.

There were two kinds of polarities, a division over strong government versus weak government, and then sectional/regional differences on economic and development issues. Three voting blocs emerged in the first session representing the Eastern, Southern and Middle states. Different ones appeared later, particularly, and ominously for national stability, the much feared North-South one. By the end of the First Congress, whatever had gone before, a hardening of positions was occurring. The House then had 39 pro-administration members and 27 who were anti-administration. Full consolidation into political parties, a situation that was to characterize the next decade, had not yet occurred but was becoming visible. This was yet another heritage this Congress left to its successors and to history: an important structure of disagreement and conflict.

Conclusion

"Tomorrow," James Madison wrote to his brother on March 2, 1791, "will put an end to our existence." The First Congress adjourned the next day. It had come a long way. It had filled out the government framework, instituted a system of national revenue, attended to the debts of the Revolution, set up a judiciary, begun to establish a presence in foreign relations, paid attentions to our borders and relations with the Indian tribes. It created a whole range of administrative agencies and it had passed a Bill of Rights. It founded a national bank and located a permanent capital. In terms of the long view, the First Congress had reminded everyone that America was a fractious entity, that Americans readily divided along ideological, local and sectional lines when provoked by government activity, that the extent of the reach and powers of the national government remained an area of contention; it showed too that there were vigorous proponents of the many positions present on the floor of the national legislature and that Congress would be a major focus in the defining and shaping of the battles over the future of the country. It was not a bad beginning.

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The "Great Departments": The Origin of the Federal Government's Executive Branch

by RICHARD ALLAN BAKER

In its first years the executive branch of the federal government consisted essentially of the president and his three principal advisers—a modest beginning. Among these advisers—the secretaries of treasury, state, and war—Treasury Secretary Alexander Hamilton ranked first, combining superior administrative skills with a sparkling intellect. Secretary of State Thomas Jefferson, who would rather have remained minister to France, took second place in this exclusive company. And the congenial Henry Knox, preoccupied with his wife's gambling debts, served without noticeable distinction as secretary of war. Playing significant supporting roles, but apart from these chiefs of the "Great Departments," were Postmaster General Samuel Osgood and Attorney General Edmund Randolph.

At the 1787 Constitutional Convention, delegates demonstrated little interest in the specifics of executive department organization. Once they had determined the powers and responsibilities of the presidential office, they simply assumed that an administrative structure would form to continue the basic governmental functions of finance, foreign relations, and defense that existed under the Articles of Confederation. The Constitution's only explicit reference to this structure appears in Article II, section 2 with the provision that the president "... may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices ...."

For several months after George Washington took his oath of office on April 30, 1789, he served as virtually the entire executive branch. Caretakers left over from the Confederation government awaited presidential and congressional initiative: John Jay as secretary of foreign affairs, Henry Knox as secretary of war and Samuel Osgood, who looked after the country's post offices. The old Treasury Board continued to manage the nation's finances.

On June 8, 1789, while waiting for Congress to pass legislation establishing the three major departments, Washington asked each of the acting secretaries for a written survey of the "real situation" within their agencies. He urged them to provide a "clear account .... as may be sufficient (without overburdening or confusing the mind which has very many objects to claim its attention at the same instant) to impress me with a full, precise, and distinct *general idea* of the affairs of the United States, so far as they are comprehended in, or connected with that department."

In his relations with the embryonic executive departments, President Washington proved to be a capable administrator. His military command and staff experience became apparent in his manner of reviewing proposals of subordinates, in outlining plans for them to expand, and in his pursuit of opinions regarding the constitutionality of legislation and policy decisions. Thomas Jefferson later described Washington's managerial style: "If a doubt of any importance arose," wrote Jefferson, the president "reserved it for conference. By this means, he was always in accurate possession of all facts and proceedings in every part of the Union, and to whatsoever department they related; he formed a central point for the different branches; preserved a unity of object and action among them; exercised that participation in the suggestion of affairs which his office made incumbent upon him; and met himself the due responsibility for whatever was done."

Initially, Washington consulted with his department heads, individually or collectively, as circumstances dictated. Within four years, however, this group began to meet regularly and became known as the president's "Cabinet." He worked with the cabinet much as he had with his senior officers during the Revolutionary War, often changing his own plan in the face of adverse opinion from his advisers. In the early years, the president encouraged opposing views and he got them in abundance in bitter clashes between Secretary of State Thomas Jefferson and Treasury Secretary Alexander Hamilton. By 1793, as the burdens of the presidency increased, Washington concluded that henceforth he would avoid advisers "whose political tenets are adverse to the measures which the general government are pursuing."

The Treasury Department

The statute creating the Treasury Department contained greater detail than those establishing the departments of State and War, yet all three were remarkably brief. Treasury was the largest of the three cabinet agencies and, during the early years of the new government's existence, it grew at a faster rate than the other two. Congress singled out that agency for special attention by providing a direct tie between it and the legislature. Unlike the heads of the other two departments, who were to carry out their duties "in such manner as the President of the United States shall, from time to time order or instruct," the treasury secretary was given a specific congressional mandate. The statute provided that he "digest and prepare plans for the improvement and management of

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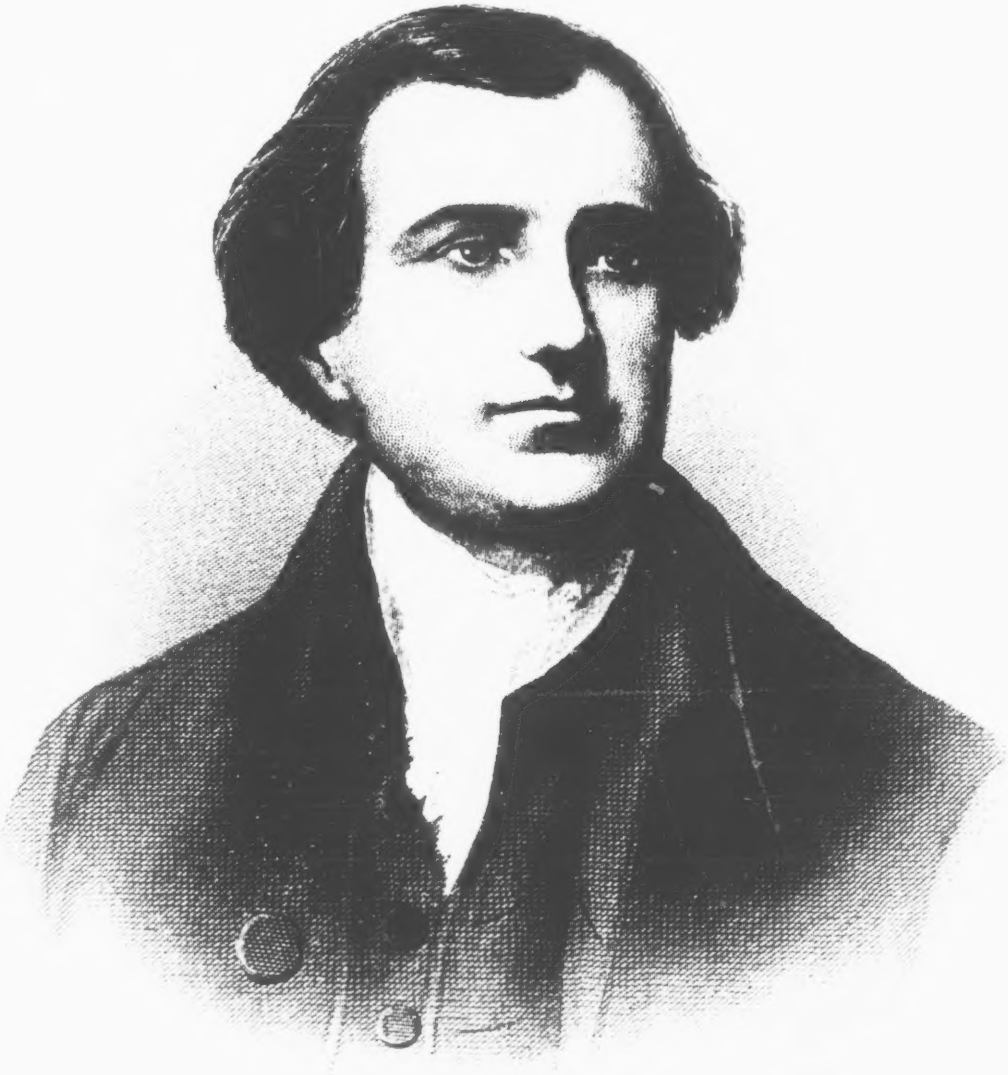


Edm: Randolph

Attorney General Edmund Randolph. *Library of Congress.*

In these formative years, the executive agencies established a high level of legitimacy and moral integrity, as well as a degree of autonomy from close legislative direction.

the revenue, and for the support of the public credit" and that he "make report, and give information to either branch of the legislature, in person or in writing . . . respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office." The act contained no explicit provision for presidential supervision of the secretary. Six days after Hamilton became treasury secretary, the House of Representatives abolished its Committee on Ways and Means. This action suggested that the House intended the secretary to take the initiative in the formulation and implementation of general financial policy: preparing revenue measures, drafting public reports, managing financial operations, and placing public funds in banks and other financial institutions.

Even before the department was officially established, Congress assigned it operational control of the customs service, light houses, and sailing vessel registration. Beyond its initial financial duties, the department soon acquired responsibility for administering a $12 million loan for conducting land surveys. Customs collectors took on the additional tasks of paying military pensions and purchasing army supplies.

The department's large number of employees reflected its broad responsibilities. At the end of 1789, its central office included six chief officers, three principal clerks, twenty-eight clerks, and two messengers. Within a year, that number had nearly doubled. By 1801, the Treasury Department employed more than half of all federal government workers, including a field staff of 1,600 revenue collectors.

Postmaster General Samuel Osgood. ***Collection of the Architect of the Capitol, Library of Congress.***

The combination of Alexander Hamilton's leadership and the Treasury Department's vital function in raising revenue made that agency preeminent. Hamilton had actively campaigned for the position well in advance of his September 1789 appointment. While many friends urged him to avoid the treasury—with the nation's finances in a "deep, dark, and dreary chaos"—and run for the Senate, or seek nomination as chief justice of the U.S. Supreme Court, Hamilton believed that he was one of the few men available who possessed the training and experience to accomplish this difficult task. When Robert Morris, financier and senator, advised the president to select the 32-year-old Hamilton, whom he described as "damned sharp," Washington immediately sent his name to the Senate, where confirmation quickly followed.

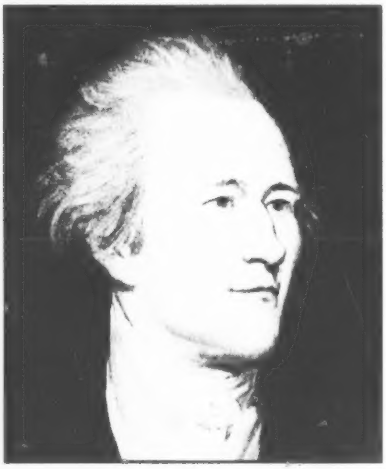
With a growing family to support, and a promising law practice under way, Hamilton realized that he was endangering his personal financial security by taking the modestly compensated $3,500-per-year post. After a month on the job, he commented, "I hazarded much, but I thought it was an occasion that called upon me to hazard."

A gifted administrator and a fiscal genius, Hamilton had been involved in the affairs of givernment since 1777 when, at the age of 20, he was appointed Washington's military aide. Five feet, seven inches tall, he maintained a strict military bearing, heightened by a touch of arrogance. A man of vast energy and deep intellect, Hamilton understood the possibilities for planned economic development under governmental direction. Above all, he preferred action to contemplation. One biographer observed that "Hamilton's credo was audacity and yet more audacity. While others temporized, calculated the risks and paused in indecision, Hamilton acted."

His intense ambition, his passion for order and efficiency, together with his tendency to meddle in the operations of other cabinet agencies, made him the administrative architect of the new government. The combination of special congressional powers vested in the Treasury Department, the president's relative inexperience in financial affairs, and Hamilton's expertise placed him in a stronger position than the secretaries of war and state to pursue a course of his own choosing. One member of Congress commented, "Congress may go home. Mr. Hamilton is all-powerful and fails in nothing he attempts."

The State Department

Compared with Treasury, the State Department remained relatively small and restricted in the scope of its activities throughout the nation's formative years. The secretary of state conducted foreign negotiations on a highly personal basis. These relations were so delicate that no secretary considered the possibility of delegating them to subordinates. With ministers in only five capitals—Paris, London, Lisbon, The Hague, and Madrid—there was little need for an administrative staff greater than a half-dozen clerks.



Secretary of the Treasury Alexander Hamilton.
Independence National Historical Park Collection.

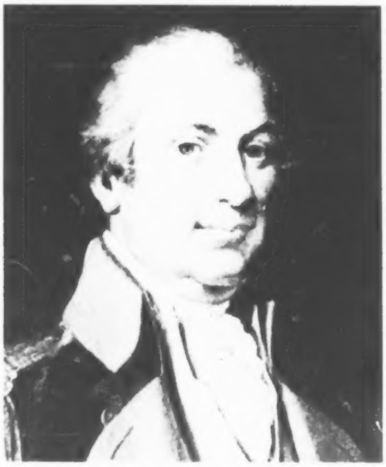
Unlike the close ties Congress set between itself and the treasury secretary, it left the secretary of state to the president's supervision and did not even require an annual report from him. The only issue that troubled legislators in devising this statute was the president's authority to remove the secretary. This question provoked the first major crisis in relations between the legislative and executive branches under the new Constitution.

For days in June 1789 a debate raged in the House of Representatives as to whether the president should seek the Senate's advice before removing officers whose initial nominations had received Senate review. The debate focused on the right of Congress to specify conditions for the operation of an executive agency, including conditions for its chief's removal, as long as those conditions did not conflict with provisions of the Constitution. It also raised the question of whether the president would be required to share administrative authority with the Senate. On a close vote, both chambers agreed that the president could remove the officers subject to Senate confirmation without Senate concurrence.

Although President Washington was content to leave management of the nation's finances to the treasury secretary, he displayed no such detachment in the realm of foreign affairs. The president routinely consulted close associates on foreign policy matters, but did not necessarily include the secretary of state in the discussions. Jefferson expressed his frustration, on one occasion, writing that as "Secretary of State to the United States, I can not receive any communication on the part of foreign ministers but for the purpose of laying it before the President, and of taking his orders upon it."

The act of July 27, 1789, which established the Department of Foreign Affairs as the first executive agency, provided only the briefest outline of its duties. They included "Correspondence, commissions, and instructions to ministers and consuls; negotiations with public ministers from foreign states or princes, memorials or other applications from foreign ministers or other foreigners"; and "such other matters respecting foreign affairs as the president assigned."

Early in its existence, the State Department acquired a significant measure of responsibility for domestic, as well as foreign, affairs. Congress had specifically rejected a proposal to create a "Home Department" in the belief that it could achieve administrative efficiency and minimize expenses by dividing these functions among the three former Confederation agencies. The major share would go to the Foreign Affairs Department as it was less burdened with work than the Treasury and War departments. Consequently, in September 1789 the Foreign Affairs Department was



Secretary of War Henry Knox. *Library of Congress.*

renamed the Department of State and given such functions as distributing federal laws to members of Congress and the states, preparing and authenticating commissions issued by the president, conducting the decennial census, granting patents and copyrights, and safekeeping government records. The department also issued instructions to federal marshals and attorneys, and coordinated the activities of federal judges.

At its beginnings, the department included two clerks. One was in charge of the Foreign Office and the other supervised the Home Office. Housed in two rooms, this staff grew slowly with the addition of a chief clerk who carried the title of undersecretary, a part-time interpreter, a doorkeeper, and a messenger. In 1792 Congress authorized two additional clerks. By 1800 the State Department of the United States included one secretary, one chief clerk, seven clerks, and a messenger.

When Thomas Jefferson took up his duties as secretary in March 1790, the department's entire budget, including his own $3,500 salary, amounted to $8,000. Jefferson had little to do at the outset of his term, for few foreign nations maintained active embassies at the seat of government, and the president had not yet appointed permanent ambassadors to the major European posts. At that time a round-trip voyage to Europe required three months. With the exchange of correspondence so delayed, resident diplomats exercised a great deal of independence. In March 1791 Jefferson complained to the minister at Madrid, "Your letter of May 6, 1789 is still the last that we have received, and that is now two years old."

Jefferson had served as U.S. minister to France from 1785 to 1789. There he grew to appreciate that country's role in maintaining American independence of Great Britain. As secretary of state, he soon engaged in sharp political infighting with Alexander Hamilton, their mutual antagonism flaring over relations with Great Britain and France. Jefferson advocated commercial sanctions against the British to force their evacuation from posts in the Northwest. Hamilton successfully blocked this strategy, fearing a serious loss of revenue from British imports. Hostilities between the two secretaries intensified as Hamilton continued to interfere in the conduct of foreign affairs and published an anonymous series of bitter attacks on Jefferson.

When not engaged with pressing foreign business, Jefferson turned his attention and creative genius to the domestic responsibilities of his office. Among the most notable of his achievements was a lengthy and enlightening report to the House of Representatives on the topic of weights and measures. A biographer observed that his conclusions, on which the House took no action, represented "an admirable combination of arithmetic and common sense." Jefferson spent a great deal of time in the administration of patents, after Congress created that system in 1790. Under the law, patent applications were to be examined by a three-man board, composed of the secretary of state, the secretary of war, and the attorney general. As a practical matter, the work fell to the secretary of state. After the attorney general ruled on the propriety of the application forms, Jefferson determined whether the individual inventions were either frivolous, unworkable, or mere modifications of existing items in common use. During his five years in office, Jefferson granted sixty-seven patents, rejecting a great many more. In 1791, weary of the task's complexity and demands on his time, Jefferson drafted a bill relieving himself of substantive responsibilities for the patent process. Two years later Congress passed a similar measure, eliminating the examination and placing responsibility for settling disputes with the courts.

Jefferson considered these and the related duties of his office as "hateful labors." As his earlier and subsequent accomplishments testified, Jefferson's greatness lay elsewhere. While secretary of state, he operated in the shadow of George Washington, who wished to be his own foreign minister. Overcome by the drudgery of the job and his battles with Hamilton, Jefferson retired at the end of 1793.

The War Department

On August 7, 1789, Congress established the War Department and within five weeks the Senate confirmed Henry Knox as secretary of war. The department's original staff included Knox and a clerk. A second clerk was added a few years later. By 1800, when the government moved from Philadelphia to Washington, the agency's total central and field office staff had grown to eighty. The department supervised the nation's two armories: one at Springfield, Massachusetts and the other at Harpers Ferry, Virginia. It also included a quartermaster's section, a fortifications branch, a paymaster, an inspector general, and an Indian office.

The early record of the department was an unhappy one. Mismanagement and incompetence characterized its administrative actions. A committee of the House of Representatives, investigating the late 1791 Indian defeat of General Arthur St. Clair's forces, determined that it resulted from improper organization of the expedition; lack of troop training and discipline; and "delays consequent upon the gross and various mismanagements and neglects in the Quartermaster's and contractor's departments." Alexander Hamilton moved to take matters into his own hands by requesting that his allies in the Senate push legislation giving his Treasury department supervision of army supply services. Congress enacted Hamilton's measure in May 1792.

Henry Knox had served since 1785 as secretary of war under the Articles of Confederation. Born in Boston, Knox concluded his formal education at the age of 12. When the Revolutionary War began in 1775, he became an artillery colonel. In the war's subsequent campaigns, Knox distinguished himself as a military commander and became a favorite of General Washington. Still, Knox proved to be a clumsy civilian administrator, undercut by a president who considered military affairs his own greatest strength. Plagued by the pressure of gambling debts, Knox became preoccupied with land speculation schemes designed to restore his family's financial health. These ventures led to further indebtedness and numerous law suits. Knox resigned as war secretary in 1794.

The Post Office

In 1789 the nation's mail system consisted of seventy-five post offices and 1,875 miles of post roads, running principally from Boston, Massachusetts to Petersburg, Virginia. In September of that year Congress passed legislation temporarily continuing post office operations as they had existed under the Articles of Confederation. Members demonstrated no interest in creating a separate postal department, or of merging its functions with an existing department. The statute simply provided that "the Postmaster General shall be subject to the direction of the President of the United States."

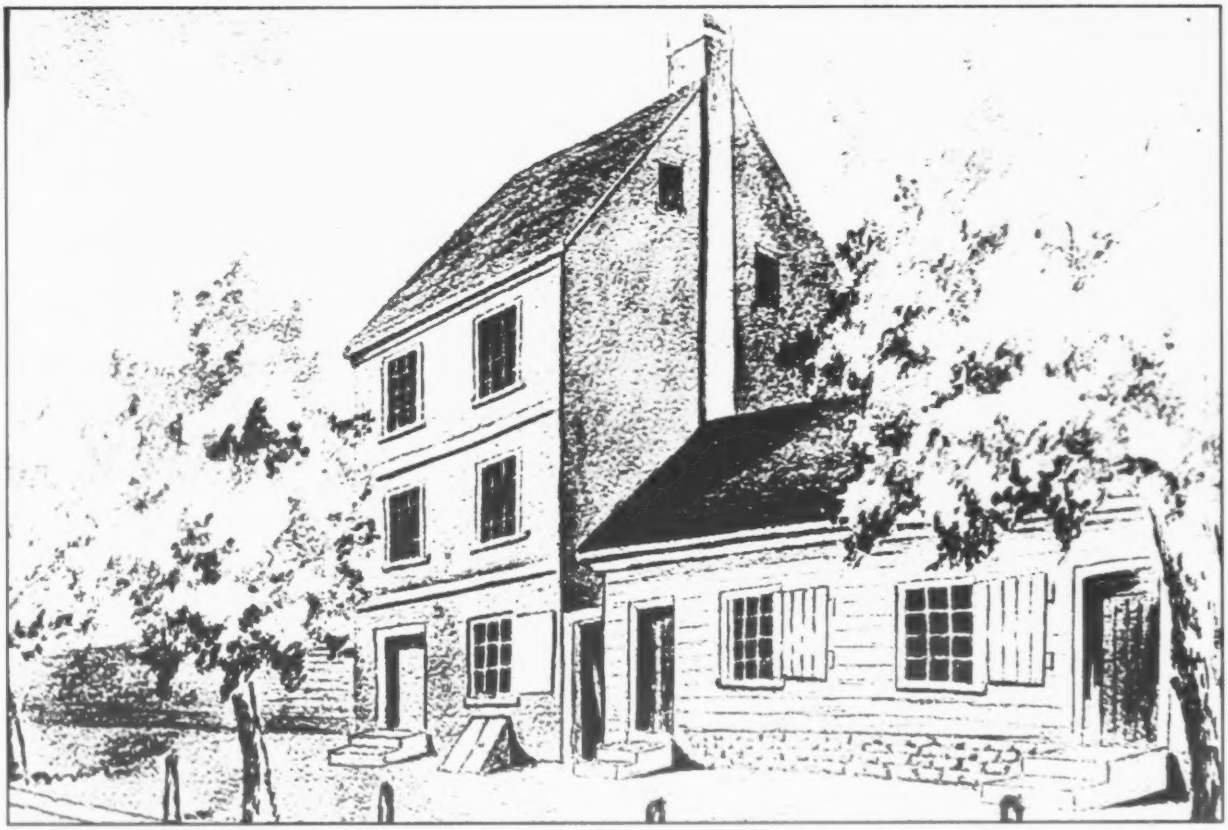
In the years before 1789, the Confederation Congress viewed the post office as a vital source of governmental revenue. In 1790, the office produced a $5,000 profit on income of $38,000. In 1792 Congress specifically placed the post office within the jurisdiction of Hamilton's Treasury Department, in recognition of its revenue producing functions. This provoked a protest from Secretary of State Jefferson, who feared that "the department of the Treasury possessed already such an influence as to swallow up the whole executive powers, and that future presidents (not supported by the weight of character which [Washington] possessed) would not be able to make head against this department."

By 1796, the department's profit-producing incentive yielded to another essential function—its capacity for communicating governmental actions to all sections of the nation. As Washington advised the House of Representatives in 1792, "The circulation of political intelligence through these vehicles is justly reckoned among the surest means of preventing the degeneracy of a free government, as well as recommending every salutary public measure to the confidence and cooperation of all virtuous citizens."

In 1790 the post office consisted of Postmaster General Samuel Osgood, who earned $1500—less than half the annual salary rate of the department secretaries—an assistant, and a clerk. His principal duties were to designate post offices, to select and maintain contact with deputy postmasters, to award contracts for carrying mail, and to keep accounts. The actual work of moving the mail fell to the deputy postmasters and contractors, whose salaries were paid by local postal revenues. Retention of competent deputy postmasters proved to be the postmaster general's greatest headache. Those part-time positions held few attractions, except in major cities. Osgood resigned in 1791 rather than move with the rest of the government from New York to Philadelphia. The post office remained a subordinate agency until 1825 when it achieved independent status as a result of presidential wishes to control politically attractive deputy postmaster appointments.

The Attorney General

Like the postmaster general, the attorney general served as a second-level presidential appointee during the federal government's early years. President Washington viewed Attorney General Edmund Randolph, who held that post from 1790 to 1794, simply as his legal adviser. Under the provisions of the 1789 Judiciary Act, which established his position, Randolph was to prosecute all suits in the Supreme Court that involved the interest of the United States government. That statute also directed him to provide legal advice to the president and department heads when they requested it. At the outset, as there were no cases before the Supreme Court, and as the president seldom sought his advice, Randolph had virtually nothing to



Site of the first American Foreign Office, 13 S. 6th Street, Philadelphia, 1781, established by Robert R. Livingston, chosen by the Continental Congress to be Secretary of Foreign Affairs. Library of Congress.

do. Reflecting this status, the attorney general received less than half the salary of cabinet secretaries and had no government staff. He was expected to conduct official business from his personal law office and to maintain a private legal practice when he was not advising the president or other federal officials. On matters of major legal consequence, President Washington frequently by-passed his attorney general in favor of Hamilton and Jefferson. The secretary of state retained responsibility for supervising federal district attorneys. Despite his persistent efforts, Randolph was unable to acquire law enforcement responsibilities. He left the position in 1794 to replace Jefferson as secretary of state.

Conclusion

Washington, Hamilton, Jefferson, and Knox, along with Osgood and Randolph, by and large built successfully on the executive structure established under the Articles of Confederation and by Congress under the Constitution. These leaders of the early executive departments achieved much for the government in a nation that less than a generation earlier had suffered the dependence of colonial rule. In these formative years, the executive agencies established a high level of legitimacy and moral integrity, as well as a degree of autonomy from close legislative direction. The president clearly exercised substantial administrative authority and responsibility for conduct of the new government's official business. He effectively delegated authority to department heads and through them to their immediate subordinates and field representatives, while retaining controls over their performance. Despite Hamilton's occasional intrusions into operations of other departments, executive agency leaders formed relatively stable relationships based on precedent, law, and presidential directives. To be sure, the achievements of these men were not untouched by failure. The Post Office was slow and unreliable. The Treasury and War departments remained unable to devise an efficient system for procuring army supplies. The patent system, after a period of rigorous executive involvement, was abandoned to the courts. Despite these shortcomings, the occasion for celebrating the Constitution's two hundredth anniversary is due in great measure to the successful establishment of the early executive departments.

Suggested additional reading:

Marcus Cunliffe, *The American Heritage History of the Presidency* (1986).

Ralph Ketcham, *President Above Party: The First American Presidency, 1789–1829* (1984).

Forrest McDonald, *Alexander Hamilton: A Biography* (1979).

Dumas Malone, *Jefferson and the Rights of Man* (1951).

Leonard D. White, *Federalists: A Study in Administrative History, 1789–1801* (1948).

Richard Allan Baker has served as director of the U.S. Senate Historical Office since that office was established in 1975. He was recently president of the Society for History in the Federal Government. He is the author of *Conservation Politics: The Senate Career of Clinton P. Anderson* and his *Senate of the United States: A Bicentennial History* will be published late in 1987.

The Birth of the Federal Court System

by DAVID EISENBERG, CHRISTINE R. JORDAN, MAEVA MARCUS, and EMILY F. VAN TASSEL

As the first justices of the Supreme Court were preparing to undertake their duties, President Washington wrote to them expressing his feelings about the importance of the job they were about to begin. "I have always been persuaded that the stability and success of the National Government and consequently the happiness of the People of the United States, would depend in a considerable degree on the Interpretation and Execution of its Laws," Washington observed. "In my opinion, therefore, it is important that the Judiciary System should not only be independent in its operations, but as perfect as possible in its formation."

Article III

The founders of the new nation believed that the establishment of a national judiciary was one of their most important tasks. Yet Article III of the Constitution of the United States, the provision that deals with the judicial brand of government, is markedly shorter than Articles I and II which created the legislative and executive branches. Moreover, at the Constitutional Convention the delegates spent relatively little time discussing judicial power. Instead they left the resolution of those issues on which they could not easily agree to the Congress that would come into being after the new frame of government was approved. Thus the story of the development of judicial power under the Constitution concerns much more than an understanding of the text of Article III.

The Constitution had not sprung full blown from the crucible of revolution but instead resulted from a growing recognition throughout the states that the Confederation was inadequate and that a stronger national government was needed if the United States was to survive. The lack of an independent judiciary to decide controversies of a national and international nature contributed to the Confederation's weakness. Congress had set up the very limited Court of Appeals in Cases of Capture to hear disputes involving ships seized during the Revolution, but it did not meet regularly and had no power to enforce its decrees.

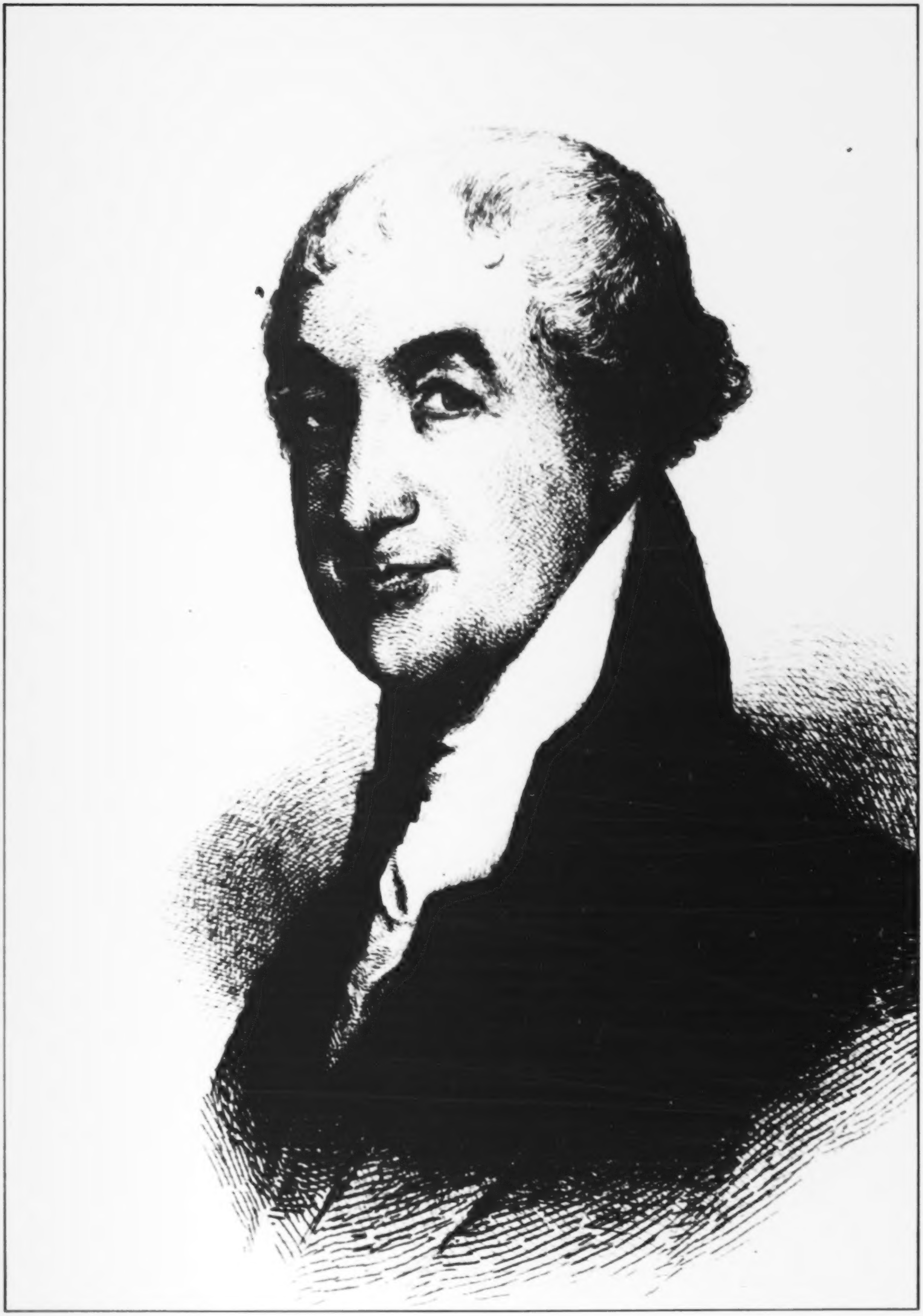
Thus the concept of a national judiciary was a new one in the late 1780s and its embodiment in Article III a cause of much concern. The structure of the judiciary was a rock upon which the Constitution could founder when it went before the states for ratification; hence Federalist efforts had focussed on creating a constitutional framework that would give wide latitude to Congress to flesh out the particulars of a court system. By creating a structure that left all the details of form and content to congressional discretion, Federalists hoped to allay—or at least postpone until after the Constitution was safely ratified—Anti-Federalist fears that the national judiciary would swallow up the state courts.

Article III of the Constitution created a federal "judicial Power" but defined it in only the broadest of terms. Section 1 provided that power "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Section 2 specified the types of cases to which the federal judicial power extended, giving the Supreme Court original jurisdiction to hear "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party." In all other categories enumerated in the section, cases would originate in lower courts but could be brought to the Supreme Court on appeal, subject to "such exceptions, and under such Regulations as the Congress shall make." Hence the Constitution left to congressional discretion the content and extent of the appellate jurisdiction of the Supreme Court, and by implication the entire jurisdiction of any lower federal courts that might be established.

The text of Article III set down certain basic principles, but the debates during the ratification process indicated that in many states there was dissatisfaction with the broad language of the judicial article and a strong demand for some additional constitutional safeguards. In his *Federalist* No. 78, Alexander Hamilton downplayed the importance of the federal judiciary by denominating it the "least dangerous" of the three branches; in No. 80 he reminded his readers that any inconvenience suggested by the generality of the plan should not condemn it, as

> the national legislature will have ample authority to make such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a general principle, which is calculated to avoid general mischiefs and to obtain general advantages.

Ideas as to what those inconveniences might be, and how best to deal with them began to circulate well before any lawmaker had so much as dipped his quill into the inkwell. Soon after the Constitutional Convention adjourned in September 1787, people were expressing fears that an extensive federal court system would prove too expensive, drag hapless defendants hundreds of miles from home, and undermine state sovereignty and in-



Senator Caleb Strong of Massachusetts. *Library of Congress.*

Although little hard evidence exists to suggest that the Judiciary Act and the Bill of Rights were deliberately fashioned to complement each other, the fact is that together they took care of most Anti-Federalist concerns about the judiciary under the Constitution.

dividual liberties.

Anti-Federalist forces led by two Virginians—George Mason, who had refused to sign the Constitution, and Richard Henry Lee, who had refused to attend the Constitutional Convention—began an immediate campaign in the press and in the state ratifying conventions to have the federal judicial power amended before ratification of the Constitution. Recalling the harsh treatment meted out by colonial governors and British Vice-Admiralty judges in the years prior to the Revolution, Anti-Federalists were particularly concerned with protecting the rights of the criminally accused. They called for a bill of rights to include protection of the right to a grand jury indictment, to a speedy and public trial by an impartial jury drawn from the vicinage (i.e., vicinity in which the crime was committed), to know the cause and nature of accusations, to confront witnesses and compel them to appear in court, to assistance of counsel, to due process of law, and to protection against self-incrimination, double jeopardy, excessive bail, fines, and cruel and unusual punishment. In non-criminal cases, Anti-Federalists also wanted as much jury protection for the individual as possible: jury trials in all civil cases, protection for jury verdicts by limiting appellate courts' power to review juries' factual determinations, and the right to due process under the law.

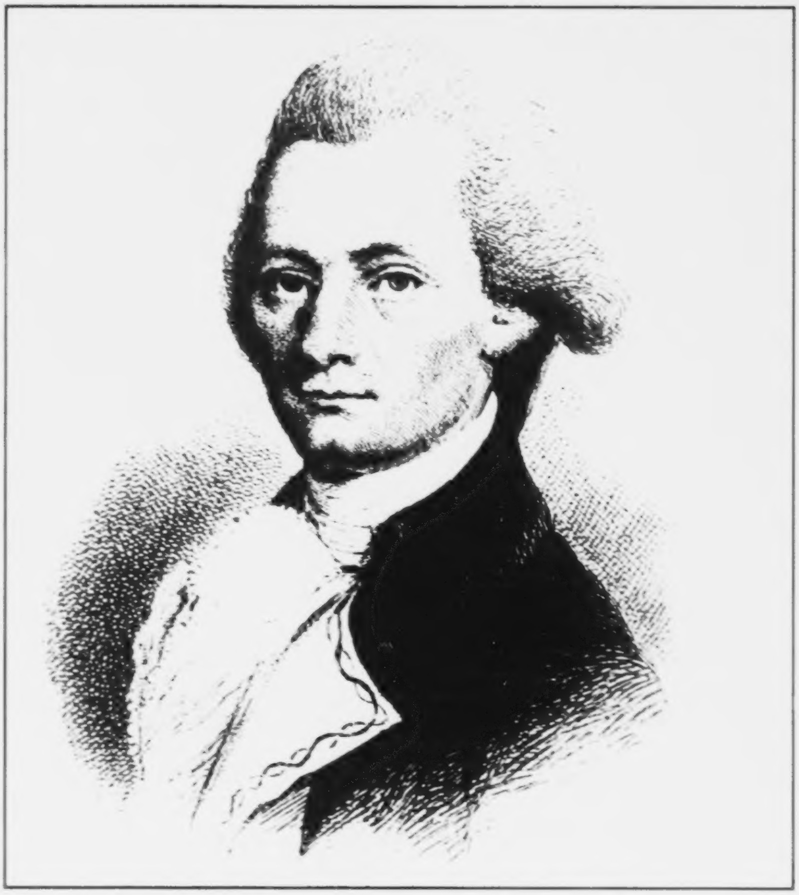
In addition to a written guarantee of individual rights, Anti-Federalists favored a number of explicit proposals to limit the power of the federal courts. At least half the state ratifying conventions recommended limiting or abolishing diversity jurisdiction—a jurisdiction based solely on the fact that the parties are citizens of different states. A proposal to restrict appeals to the Supreme Court to cases involving only large sums of money also gained considerable support during the ratification process of 1787–1788. Another Anti-Federalist proposal, which came to have support among some cost-conscious Federalists as well, was the use of state courts as lower federal courts. Roger Sherman of Connecticut, a member of the Constitutional Convention and soon to be a member of the First Congress, endorsed just such an idea in his essay "A Citizen of New Haven," published on January 1, 1787. Even such a leading Federalist as James Madison, on the eve of his election to the House of Representatives in January 1789, acknowledged the need for some sort of bill of rights to protect individual liberties and some sort of restriction on appeals in the federal courts. As early as March 15, 1789, the staunch Massachusetts Federalist Fisher Ames reported from New York to a friend in New England that a judicial plan was being discussed by three or four persons that would limit diversity suits and suits involving foreigners to cases where the sum in controversy was over five hundred dollars. He further commented that the great objectives of low cost and allaying state-federal jealousies might best be accomplished by narrowing rather than expanding federal jurisdiction.

The Judiciary Act of 1789

It fell to the First Congress to interpret the various sections of Article III and to take into consideration the amendments demanded by several states as the price of ratification. By drawing up the Bill of Rights and enacting the Judiciary Act of 1789, the First Congress met the concerns of many. It was able to establish a working judicial system that pleased no one completely, but which could be changed as experience showed it to be necessary or desirable.

While the House of Representatives began its work on the first important piece of financial legislation, a revenue system, the Senate, acknowledging the pivotal role that the federal court system must play in the new government, began its legislative work by appointing a committee to prepare a judiciary bill. The committee as formed on April 7, 1789, consisted of one Senator from each state: Oliver Ellsworth of Connecticut, William Paterson of New Jersey, Caleb Strong of Massachusetts, Richard Henry Lee of Virginia, Richard Bassett of Delaware, William Maclay of Pennsylvania, William Few of Georgia, and Paine Wingate of New Hampshire. Charles Carroll of Maryland and Ralph Izard of South Carolina, arriving late for the opening of Congress, were added to the roster six days later.

Only Ellsworth, Paterson and Strong, of the ten committee members on whom the judiciary's fate depended, could claim any sizable technical legal expertise; but most had a strong political and legislative background. Six had been members of the Continental Congress (Ellsworth, Few, Carroll, Izard, Wingate, and Lee). Five had been members of the Constitutional Convention (Ellsworth, Strong, Paterson, Bassett, and Few). Five had been members of their state ratifying convention (Ellsworth, Strong, Few, Bassett, and Izard). Nearly all had held a variety of state offices. Politically all were Federalists with the exception of Richard Henry Lee, a leading Anti-Federalist and a harsh critic of an expansive federal judiciary, and William Maclay, who was elected by Pennsylvania to represent the state's agricultural inter-



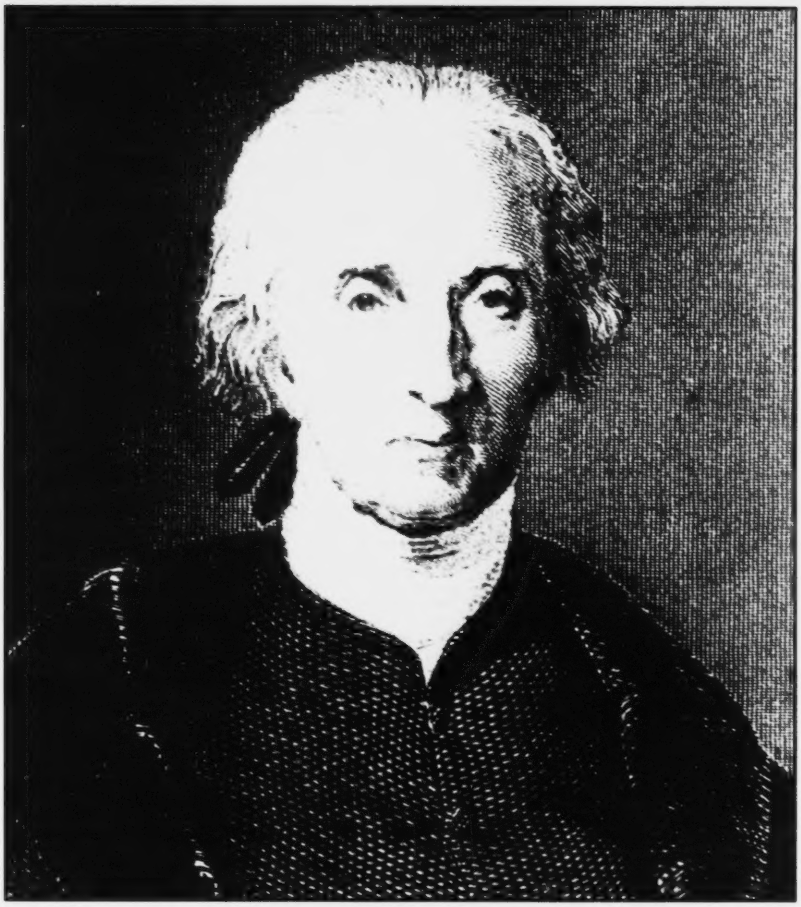
Senator William Few of Georgia. *Library of Congress.*

ests.

The combination of extensive legal experience and firsthand knowledge of the Constitution seems to have been a key factor in determining who would write the bill; for it was the three men with both characteristics—Ellsworth, Paterson, and Strong—in whose handwriting the first draft appeared. Ellsworth, in particular, dominated the proceedings, from the first page of handwritten text, through the debates, to the final conference with the House. "This vile bill is a child of his," fumed the irascible diarist, William Maclay, "and he defends it with the care of a parent, even in wrath and anger." Maclay's disgruntlement aside, Ellsworth was eminently qualified for the job of creating a bill that, after all the politics were exhausted, still had perforce to deal with a multitude of arcane details. Ellsworth's background included service on the Continental Congress Committee on Appeals (giving him firsthand experience with the problems of appellate jurisdiction in a federal system); he had also been a member of the Governor's Council and a state court judge in Connecticut, as well as a member of the Constitutional Convention and the Connecticut ratifying convention. Caleb Strong had served in the Constitutional Convention and the Massachusetts ratifying convention. William Paterson had been attorney general of New Jersey and had also been present at Philadelphia for the drafting of the Constitution.

Within three weeks the committee had drafted a set of guiding principles that clearly reflected the concerns raised during the ratification debate over limiting federal court jurisdiction. The resolutions indicated that the committee favored a small judiciary and had already adopted the idea of limiting non-criminal cases tried in federal courts to those involving large sums of money. The structure created by the committee included a Supreme Court and two levels of lower federal courts. The draft bill specified a six-judge Supreme Court, to convene twice yearly in the national capital. During the months when they were not sitting as the Supreme Court, the justices were made responsible for hearing trials and appeals on circuit in the several states, sitting in pairs in conjunction with a district court judge. The district court judges would come from the courts established in each state as federal trial courts, responsible primarily for hearing admiralty cases. The circuit court's jurisdiction in non-criminal cases was restricted in most instances to cases of at least three hundred dollars or more. Appeals to the Supreme Court could only be made in cases involving amounts above two thousand dollars. Finally, the committee gave the Supreme Court explicit powers of judicial review over state supreme court decisions involving federal law. There seemed to have been a consensus that only cases involving substantial amounts of money should be subject to federal appellate review unless an interpretation of the federal Constitution, a statute or a treaty were in question.

The drafting efforts of Paterson, Ellsworth, and Strong culminated in a first reading before the full Senate on June 12. When printed for distribution and Senate debate, the bill ran sixteen pages. District court jurisdiction, which was to give rise to the greatest debate in both houses, had been fleshed out in more detail. In addition to exclusive original jurisdiction over all civil admiralty and maritime cases, district courts were also given jurisdiction over some other lesser federal matters. The committee made trial by jury protections explicit in several situations, among them criminal cases and suits brought by the United States for amounts over one hundred dollars. Similarly, jury



Senator Charles Carroll of Maryland. *Library of Congress.*

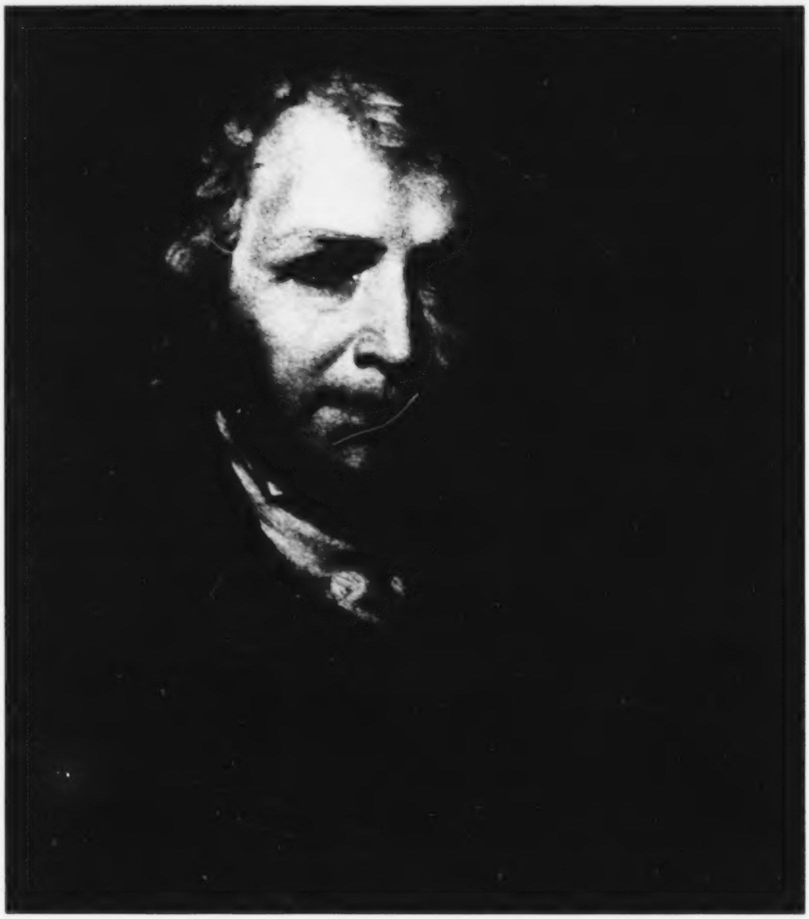
trials were required in civil and criminal cases in the circuit courts and in original Supreme Court cases involving individuals who were United States citizens. It is clear that Richard Henry Lee wanted his jury trial protections incorporated at every possible point.

After agreeing to report the committee bill, Richard Henry Lee then leveled an Anti-Federalist attack at the jurisdiction of the district courts. On the opening day of debate, June 22, Lee moved to limit the district courts to admiralty jurisdiction. Simply stated, Lee's proposed amendment called for the judiciaries of the several states to serve as lower federal courts in most instances. While many people believed that state courts could handle the business that might be assigned to lower federal courts, opponents of this view argued that state control over the application of federal law would result in diminished popular confidence that national laws were being executed impartially. State judges who held office only for specified terms could not be relied upon to be independent, and appeals to the Supreme Court would have to be allowed in large numbers of cases to ensure the enforcement of national interests. Moreover, some argued that as soon as state judges exercised federal powers they would become federal judges, with life tenure and secure salaries as mandated by the second clause of Article III section 1. Why Lee chose to introduce his amendment after apparently having gone along with the committee in setting up a lower court system is not known. Perhaps Lee felt obligated to bring this proposal to the attention of the full Senate because he had been so directed by the Virginia legislature. The oddity is increased by the fact that Virginia had just enacted a restriction on its courts forbidding them to try causes arising under the laws of the United States.

Even Maclay, who had been on the committee with Lee and who would join Lee in voting against the bill in its final form, did not support Lee on this point. Maclay joined with the Federalists in believing that the Constitution's scheme would be thwarted unless the federal courts could adjudicate other issues besides admiralty—such as taxation, duties and imports, naturalization, coinage, counterfeiting, and treason. He also made the longstanding Federalist point that the state judges would not enforce federal laws. William Paterson may have advanced some of the additional reasons against using state courts as federal tribunals: his personal notes reflect that he thought the elective office of most state judges was not compatible with the constitutional requirements of tenure during good behavior and fixed salaries. Paterson agreed that state judges should not be relied upon to enforce federal criminal laws or the collection of federal revenue. The Federalist majority, many of whom had already rejected the notion of state courts as lower federal courts in their correspondence with constituents, followed this view.

The Bill of Rights

At the same time that the Senate was considering the judiciary bill, the House had taken up the subject of a bill of rights. As originally proposed by James Madison on June 6 it included several amendments pertaining to the judicial system. Deemed most important were those protecting the rights of the criminally accused: the right to grand jury indictment, to a speedy and public trial by an impartial jury of the vicinage, to know the cause and nature of accusations, to confront witnesses and have compulsory process to produce them, to assistance of counsel, to due proc-



Justice Samuel Chase, *painting by John Wesley Jarvis. National Portrait Gallery, Smithsonian Institution.*

ess, and to protection against self-incrimination, double jeopardy, excessive bail, fines, and cruel and unusual punishment. With the exception of the jury of the vicinage, which was struck by the Senate, all of these became parts of the Fifth, Sixth and Eighth Amendments. Madison's list also included the three judicial system amendments considered most important by the Anti-Federalists: a guarantee of jury trial in common law cases (that is, suits governed by earlier judicial decisions rather than by statutes) above twenty dollars; a prohibition on the re-examination of the facts found in a case by the trial court except by the restrictive rules of the common law (which meant that jury decisions would not be easily overturned); and a monetary restriction on all appeals to the Supreme Court. The Senate removed this last provision, but the first two became the Seventh Amendment. The Senate also voted down a requirement for unanimous jury verdicts and the grant of a right to make jury challenges. Moreover, that body refused to agree to what Madison considered the most important of all: a prohibition against state violations of fundamental rights, including trial by jury.

Although Madison had received House approval of his amendments as the only ones to be discussed, members continued to attempt additions. The most extreme judicial amendments offered were those of Thomas Tudor Tucker of South Carolina to limit lower federal courts to admiralty jurisdiction and to prohibit any federal jurisdiction over diversity cases, suits involving foreigners, and suits involving land grants from two different states. Unsuccessful in that effort, Tucker, on the last day of debate again tried, but failed, to limit the lower courts to hearing only admirality cases.

Having postponed consideration of the judiciary bill until after passage of a bill of rights, the House began debate on the former on August 27. Despite heavy speculation that Madison would lead the attack he failed to do so and few substantive changes were made. Tucker renewed his attempts, made without success during the bill of rights debates, to eliminate the district courts. He was joined in this by Samuel Livermore of New Hampshire; their proposal engendered more debate than any other issue, but ultimately went down to defeat. In his closing speech on the bill, delivered on September 17, Madison summed up the views of most of his colleagues that the bill, however imperfect, was the best they could get at this late date in the session, and that it could always be changed as experience proved necessary.

The only direct evidence of interaction between the two houses as they considered the judiciary bill and the bill of rights is a letter of September 24 from Madison to Edmund Pendleton, discussing the bill of rights. "It will be impossible I find to prevail on the Senate to concur in limitation on the value of appeals to the Supreme Court," complained Madison,

> which they say is unnecessary, and might be embarrassing in questions of national or Constitutional importance in their principle, tho' of small pecuniary amount. They are equally inflexible in opposing a definition of the locality of Juries. The vicinage they contend is either too vague or too strict, too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the County.... The Senate suppose also that the provision for vicinage in the Judiciary bill, will sufficiently quiet the fears which called for an amendment on this point.

On September 19 the Senate had

proposed a compromise to the judiciary bill which allowed the trial jury in capital cases to be drawn from the county in which the crime was committed. It was adopted by the House on September 21, the same day that a joint conference committee of Representatives Madison, Sherman and Vining, and Senators Ellsworth, Paterson and Carroll was appointed to resolve the differences over the bill of rights. Three days later on September 24, as the conference committee was agreeing to limit constitutional protection to a jury of the district, President Washington signed the Judiciary Act into law. Although little hard evidence exists to suggest that the Judiciary Act and the Bill of Rights were deliberately fashioned to complement each other, the fact is that together they took care of most Anti-Federalist concerns about the judiciary under the Constitution.

Probably none of the Judiciary Act's provisions captured the spirit of balancing state and federal interests that informed the creation of the Act better than Section 34. The section stipulated, simply enough,

> [t]hat the laws of the several States except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at comon law in the Courts of the United States in cases where they apply.

While the First Congress may well have intended "laws of the several states" merely as a shorthand for all the laws then in effect, including the unwritten common law, it is equally possible that the framers meant "laws" to refer only to statutes, leaving the federal courts free to fashion common law remedies of their own. Even if the drafters did intend that "laws" include the common law of the several states, they may have wished merely to permit, not to compel, the federal trial courts to apply state common law. Still another possibility is that the bill's framers deliberately worded the provision vaguely so as to leave its meaning open to future judicial interpretation. Its literal meaning notwithstanding, the thirty-fourth section was written, like the other sections, in the spirit of reconciling national interests with those of the various states. The enactment of the Judiciary Act of 1789 marked the culmination of an effort to implement federal law adequately and yet in a manner least detrimental to state policies and practices.

Conclusion

The passage of the Judiciary Act of 1789 was crucial to the growth of the federal judiciary. The remarks of Associate Justice Samuel Chase, in a 1799 opinion, sum up its importance. "The notion has frequently been entertained," noted Chase,

> that the federal courts derive their judicial power immediately from the Constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us or to any other court, it still remains at the legislative disposal.

The generality of Article III of the Constitution raised questions that Congress had to address in the Judiciary Act of 1789. These questions had no easy answers, and the solutions to them were achieved politically. The First Congress decided that it could regulate the jurisdiction of all federal courts, and in the Judiciary Act of 1789 Congress established with great particularity a limited jurisdiction for the district and circuit courts, gave the Supreme Court the original jurisdiction provided for in the Constitution, and granted the Court appellate jurisdiction in cases from the federal circuit courts and from state courts where those courts' rulings had rejected federal claims. The decision to grant federal courts a jurisdiction more restrictive than that allowed by the Constitution represented a recognition by the Congress that the people of the United States would not find a full-blown federal court system palatable at that time.

For nearly all of the next century the judicial system remained essentially as established by the Judiciary Act of 1789. Only after the country had expanded across a continent and had been torn apart by civil war were major changes made. A separate tier of appellate circuit courts created in 1891 removed the burden of circuit riding from the shoulders of the Supreme Court justices but otherwise left intact the judicial structure.

With minor adjustments it is the same system we have today. Congress has continued to build on the interpretation of the drafters of the first judiciary act in exercising a discretionary power to expand or restrict federal court jurisdiction. While opinions as to what constitutes the proper balance of federal and state concerns vary no less today than they did nearly two centuries ago, the fact that today's federal court system closely resembles the one created in 1789 suggests that the First Congress performed its job admirably.

The authors have all been associated with the *Documentary History of the Supreme Court of the United States, 1789–1800.*

DOCUMENTS

Ratifying the New Constitution

by JOHN P. KAMINSKI

Long before the Constitutional Convention assembled, Americans believed that they were in a crisis. By mid-1786 some people thought that the country had to be divided into three smaller confederacies or to return to a monarchical form of government. George Washington wrote to John Jay:

> *What astonishing changes a few years are capable of producing. I am told that even respectable characters speak of a monarchical form of Government without horror. From thinking proceeds speaking; thence to acting is often but a single step.*
>
> **George Washington to John Jay**
> **1 August 1786**
> ***(George Washington Papers, Library of Congress)***

For a number of observers, the Constitutional Convention offered the last chance to save the Confederation. Thus the *American Museum* magazine, published in Philadelphia, warned Americans in March 1787:

> *Many, very many wish to see an emperor at the head of our nation. And unless the states very soon give to Congress the necessary powers to regulate trade and to form a system of finance for the support of national credit, such an event may take place suddenly. It may not be at the distance of one short year.*

With this crisis at hand, Americans were advised to accept whatever the upcoming Constitutional Convention might propose. A correspondent in the June 30, 1787, *Massachusetts Centinel* predicted ominously:

> *Unless an energetick, permanent continental government is speedily established, our liberties will be set afloat in the confusion that will inevitably ensue. At present we . . . are every day tottering on the brink of civil dissention. . . . It would be better to embrace almost any expedient rather than to remain where we are.*

The Petersburg *Virginia Gazette* for July 26 concurred. "The Grand Foederal Convention it is hoped will act wisely, for on their deliberations alone, and our acquiescence, depends our future happiness and prosperity."

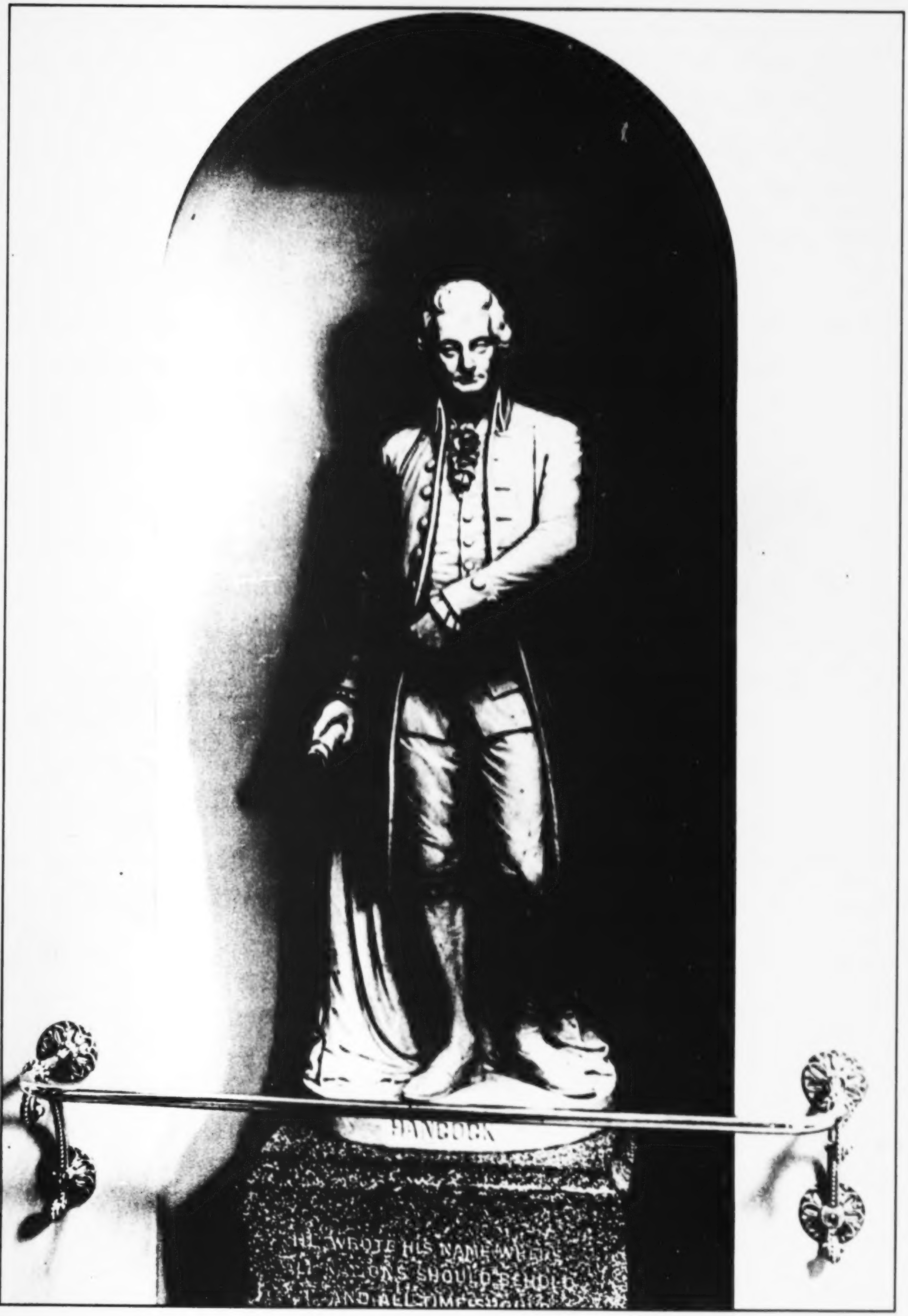
Many of these newspaper warnings were spontaneous, but some were well orchestrated. Federalist David Humphreys, who operated two newspapers in Connecticut, wrote George Washington shortly after the Constitutional Convention adjourned:

> *Indeed the well affected have not been wanting in efforts to prepare the minds of the Citizens for the favorable reception of whatever might be the result of your Proceedings. . . . Judicious & well-timed publications have great efficacy in ripening the judgment of men.*
>
> **David Humphreys to George Washington, 28 September 1787 *(George Washington Papers, Library of Congress)***

Confederation Secretary of War Henry Knox wrote to the Marquis de Lafayette at about the same time, "The minds of the people at large were fully prepared for a change without any particular specification." The printers of the *Northern Centinel* in Lansingburgh, New York, even admitted that they "conceived it a duty incumbent on them to prepare the minds of their readers" for the reception of whatever the Constitutional Convention proposed. Thus, even before the Constitution was published, Federalists had won a decisive battle in the war to ratify the new form of government. In this atmosphere the delegates to the Constitutional Convention signed the new Constitution on September 17, 1787, ending four long months of secret debates.

One of the most important subjects decided in the Constitutional Convention was how the new Constitution would be adopted. The experience of the previous six years convinced many delegates that their recommendations, whatever they might be, would not obtain the unanimous approval of the state legislatures as required by the Articles of Confederation.

In recognition of this problem, the Virginia Resolutions, introduced in the Constitutional Convention on May 29, 1787, provided that the Convention's recommendation ought first to be approved by Congress and then be submitted to specially elected state ratifying conventions for their approval. Some delegates opposed this novel idea and wanted to abide by the ratification procedure provided by the Articles. Others, however, pointed


HANCOCK
HE WROTE HIS NAME WHERE
ALL NATIONS SHOULD BEHOLD
AND ALL TIMES SHOULD

John Hancock, *marble statue by Horatio Stone. Collection of the Architect of the Capitol, Library of Congress.*

to the utility of state conventions. They would be single-house bodies, which made it easier to obtain their approval than the approval of the state legislatures, which required a vote in each of two houses. Some of the ablest men in the country were not members of the state legislatures and could be elected to the ratifying conventions. Furthermore, since the Convention's recommendations would probably reduce the powers of the states, the state legislatures would be less likely than conventions to approve the new Constitution.

On June 5, James Wilson of Pennsylvania proposed that a plurality of the states be sufficient to adopt the Convention's recommendations, the first mention of the abandonment of the unanimity provision of the Articles of Confederation. No one objected. Twelve weeks later the Convention reconsidered the issue. Different delegates proposed that seven, eight, nine or all thirteen states be required to ratify the Constitution. Gouverneur Morris of Pennsylvania suggested that a smaller number of states be required for ratification if the states were contiguous and a larger number if the ratifying states were dispersed. James Madison proposed that seven or more states entitled to a majority of representatives in the first U.S. House of Representatives would be proper. This formula would "require the concurrence of a majority of both the States and people."

At this point John Dickinson of Delaware asked whether Congress' assent was needed for ratification and whether the non-ratifying states could be ignored. The Convention decided that Congress' approval was not needed to adopt the new Constitution and that once nine state conventions had ratified, the Constitution would take effect among the ratifying states. These decisions played a critical role in the ratification process.

On Tuesday, September 18, the Constitution was printed as a six-page broadside in Philadelphia. It was also printed in the Philadelphia *Evening Chronicle* on the eighteenth and the next day in five other Philadelphia newspapers. By the end of October at least seventy-five newspapers had printed the proposal for a new form of government.

The Constitution was read in Congress on September 20, 1787, and debate over it began a week later. Critics wanted the Constitution sent to the states with the acknowledgment that the Constitutional Convention had violated the Articles of Confederation, the congressional resolution of February 21 calling the Convention, and the instructions given by most of the state legislatures. Supporters of the Constitution wanted it sent to the states with the approbation of Congress. On September 27 Virginia delegate Richard Henry Lee moved that a bill of rights be appended to the Constitution, but the motion was rejected. Anti-Federalists knew that there was nothing they could do to prevent Congress from endorsing the new Constitution. But Federalists wanted to propagate the illusion that the Constitution was warmly supported by all of Congress—they did not want opposition to appear officially either on the journals of Congress or in the resolution sending the Constitution to the states. Consequently a compromise was reached: Congress would transmit the Constitution to the states with neither approbation nor a minority expression of disapprobation. The resolution sending the Constitution to the states thus read tersely:

> *Congress having received the report of the Convention lately assembled in Philadelphia*
>
> *Resolved Unanimously that the said Report with the resolutions and letter accompanying the same be transmitted to the several legislatures in order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.*

Commenting on the congressional resolution, George Washington observed:

> *I am better pleased that the proceedings of the Convention is handed from Congress by a unanimous vote (feeble as it is) than if it had appeared under stronger marks of approbation without it.—This apparent unanimity will have its effect.—Not every one has opportunities to peep behind the curtain; and as the multitude often judge from externals, the appearance of unanimity in that body, on this occasn., will be of great importance.*

George Washington to James Madison, 10 October 1787 *(Special Collections, Signers of the Declaration of Independence, Amherst College)*

Reports of the public's reception of the Constitution were scattered at first. By mid-October, however, delegates to Congress were informing their

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correspondents about the reaction to the Constitution that had come in from around the country. One of these reports was sent by Virginia delegate Edward Carrington to Thomas Jefferson, U.S. Minister to France:

> *The project is warmly received in the Eastern States, and has become pretty generally a subject of consideration in Town-meetings and other Assemblies of the people, the usual result whereof, are declarations for its adoption. In the Middle States appearances are generally for it, but not being in habits of assembling for public objects, as is the case to the Eastward, the people have given but few instances of collective declarations. Some symptoms of opposition have appeared in New York and Pennsylvania . . . From the Southern States we are but imperfectly informed—every member from the Carolina's and Georgia, as well in Convention, as Congress, are warm for the new constitution, and when we consider the ascendency possessed by men of this description over the people in those States, it may well be concluded, that the reception will be favorable. In Virginia there may be some difficulty—two of her members in Convention whose characters entitle them to the public confidence, refused to sign the report—these were Colo[nel George] Mason and Governor [Edmund] Randolph, nor was that state without its dissentients, of the same description, in Congress—these were Mr. R.H. Lee & Mr. [William] Grayson, but upon very opposite principles—the former because it is too strong, the latter because it is too weak.*
>
> **Edward Carrington to Thomas Jefferson, 23 October 1787 *(Thomas Jefferson Papers, Library of Congress)***

Departing from the unanimity they displayed before the adjournment of the Constitutional Convention, newspapers waged a veritable war over the Constitution when it was published. On September 26, the Philadelphia *Freeman's Journal* published the first public criticism of the Constitution. This attack was followed by others: the first of seven essays by "Cato" (thought to be New York Governor George Clinton) in the *New York Journal* on September 27; an address by sixteen Anti-Federalist Pennsylvania assemblymen in the Philadelphia *Independent Gazetteer* on October 2; and the first of eighteen essays by "Centinel" (Samuel Bryan) also in the Philadelphia *Independent Gazetteer* on October 5. Federalists countered with three essays by "An American Citizen" (Tench Coxe) in the Philadelphia *Independent Gazetteer* on September 26, 28, and 29; the first of three essays by "Curtius" in the New York *Daily Advertiser* on September 29; the first of two essays by "Caesar" (thought to be Alexander Hamilton) in the New York *Daily Advertiser* on October 1; and James Wilson's public speech in Philadelphia on October 6 in the *Pennsylvania Herald* three days later.

The most extensive and thoughtful series published explaining the nature of the new government was *The Federalist*. Published between October 27, 1787 and May 28, 1788, the eighty-five essays (written by Alexander Hamilton, James Madison and John Jay) were published in newspapers and in a two-volume book edition—the first volume containing thirty-six essays appeared on March 22, 1787; the second volume with the remaining forty-nine numbers on May 28. Federalists, for the most part, believed that these essays presented the best analysis of the Constitution. Anti-Federalists and some less appreciative Federalists thought the essays were too "elaborate" and "not well calculated for the common people." The actual impact of *The Federalist* on the ratification struggle is uncertain, but their importance in American political thought has increased with the passing of time.

The crux of the issue dividing Anti-Federalists and Federalists was well put by James Madison in his *Federalist* No. 51.

> *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.*

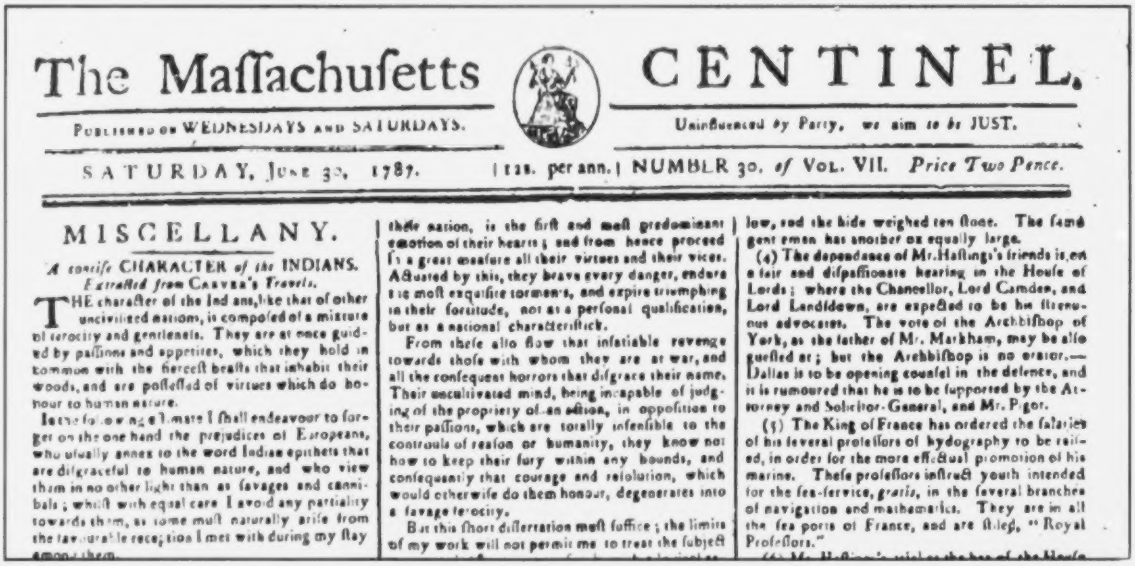
Anti-Federalists agreed with Federalists that the new government under the Constitution would be able to control the people, but they did not believe that the government would be able to control those in power.

Anti-Federalists feared that the Constitution would create a national government that would end in either an aristocracy or monarchy. The Constitution was, in their judgment, a counterrevolution that would overthrow the principles of the Declaration of Independence. The President and the Senate were too powerful. The Senate had legislative, executive and judicial powers, thus violating the commonly accepted theory that there ought to be a complete separation of powers among the different branches of government. The House of Representatives was too small and thus would not adequately represent all segments of American society. Terms of office were too long and Congress' power to regulate federal elections was dangerous. The provisions in the Articles of Confederation for recall of legislators and for the mandatory rotation of office for all elected officials had been abandoned. Congress also had other dangerous powers, some of which were undefined (the "necessary and proper" clause and the general welfare clause). Patrick Henry warned his fellow Virginians in the state's ratifying convention:

> *There are sufficient guards placed [in the Constitution] against sedition and licentiousness: For when power is given to this Government to suppress these, or, for any other purpose, the language it assumes is clear, express, and unequivocal, but when this Constitution speaks of privileges, there is an ambiguity, a fatal ambiguity;—an ambiguity which is very astonishing.*
>
> **Speech in Virginia Convention, 5 June 1788 (*Debates and Other Proceedings of the Convention of Virginia* [3 vols., Petersburg, Va., 1788–89], I, 58)**

Consequently, Anti-Federalists wanted the reestablishment of Article II of the Articles of Confederation which provided that each state retained its sovereignty and independence and that all powers that were not expressly delegated to Congress were reserved to the states. Anti-Federalists also charged that various provisions of the Constitution recognized, condoned, protected and even encouraged slavery.

But the most serious Anti-Federalist charge was that the Constitution lacked a bill of rights. This omission was especially dangerous because the Constitution provided that the Constitution, treaties, and laws made in pursuance of the Constitution were supreme no matter what state judges said or what was in state laws or constitutions. Thus, despite Federalists' assertions to the contrary, state bills of rights were worthless when



The Maſſachuſetts CENTINEL.

Published on WEDNESDAYS and SATURDAYS.

Uninfluenced by Party, we aim to be JUST.

SATURDAY, June 30, 1787. | 12s. per ann. | NUMBER 30, *of* Vol. VII. *Price Two Pence.*

MISCELLANY.

A conciſe CHARACTER *of the* INDIANS.
Extracted from Carver's *Travels.*

THE character of the Indians, like that of other uncivilized nations, is compoſed of a mixture of ferocity and gentleneſs. They are at once guided by paſſions and appetites, which they hold in common with the fierceſt beaſts that inhabit their woods, and are poſſeſſed of virtues which do honour to human nature.

In the following eſtimate I ſhall endeavour to forget on the one hand the prejudices of Europeans, who uſually annex to the word Indian epithets that are diſgraceful to human nature, and who view them in no other light than as ſavages and cannibals; whilſt with equal care I avoid any partiality towards them, as ſome muſt naturally ariſe from the favourable reception I met with during my ſtay among them.

their nation, is the firſt and moſt predominant emotion of their hearts; and from hence proceed in a great meaſure all their virtues and their vices. Actuated by this, they brave every danger, endure the moſt exquiſite torments, and expire triumphing in their fortitude, not as a perſonal qualification, but as a national characteriſtick.

From theſe alſo flow that inſatiable revenge towards thoſe with whom they are at war, and all the conſequent horrors that diſgrace their name. Their uncultivated mind, being incapable of judging of the propriety of an action, in oppoſition to their paſſions, which are totally inſenſible to the controuls of reaſon or humanity, they know not how to keep their fury within any bounds, and conſequently that courage and reſolution, which would otherwiſe do them honour, degenerates into a ſavage ferocity.

But this ſhort diſſertation muſt ſuffice; the limits of my work will not permit me to treat the ſubject

low, and the hide weighed ten ſtone. The ſame gentleman has another ox equally large.

(4) The dependance of Mr. Haſtings's friends is on a fair and diſpaſſionate hearing in the Houſe of Lords; where the Chancellor, Lord Camden, and Lord Landſdown, are expected to be his ſtrenuous advocates. The vote of the Archbiſhop of York, as the father of Mr. Markham, may be alſo gueſſed at; but the Archbiſhop is no orator.—Dallas is to be opening counſel in the defence, and it is rumoured that he is to be ſupported by the Attorney and Solicitor-General, and Mr. Pigot.

(5) The King of France has ordered the ſalaries of his ſeveral profeſſors of hydography to be raiſed, in order for the more effectual promotion of his marine. Theſe profeſſors inſtruct youth intended for the ſea-ſervice, *gratis*, in the ſeveral branches of navigation and mathematics. They are in all the ſea ports of France, and are ſtiled, "Royal Profeſſors."

Masthead of the Mass. Centinel with date/ Library of Congress.

they conflicted with federal law.

Federalists responded that the Constitution would create a confederated republic with powers divided among legislative, executive and judicial branches that would check each other. They believed that the Constitution was the fruition of the Revolution. After all, didn't the Declaration of Independence condone the right of revolution? The Constitution was, in essence, a peaceful revolution in favor of government. Federalists argued that the new government would have only delegated powers, and thus a bill of rights was unnecessary and maybe even dangerous because every right retained by the people could not be listed. The unanimity of the Constitutional Convention demonstrated that the Constitution was an accommodation among many jarring interests. The great men of the country—led by George Washington and Benjamin Franklin—favored the Constitution, while opponents were labeled selfish state officeholders, demagogues, debtors, Shaysites, Tories, and worse.

Federalists believed that the Constitution would secure personal and economic liberties. If the Constitution were rejected, they argued, anarchy would ensue; and, using the circular theory of government, it would be followed by the usurpation of power by a tyrant who would promise stability but, in time, would establish despotism. Once the new government was functioning, defects in the Constitution could be corrected through its own process of amendment.

Pennsylvania was the first state to consider the Constitution. The Constitutional Convention met in Philadelphia in Independence Hall, the same building in which the Pennsylvania Assembly was meeting. Thus when the Convention adjourned on September 17, the Pennsylvania delegates immediately sent a letter to its legislature informing it that a new Constitution had been proposed and that they were ready to make a report. The Assembly fixed 11 o'clock the next morning as the time to consider the report. Benjamin Franklin, President of the Pennsylvania Supreme Executive Council, led the delegation in to the Assembly chamber and presented the Constitution saying that it would "tend to promote the happiness and prosperity of" Pennsylvania and the United States. For the next ten days the Assembly debated whether a state convention should be called immediately—even before Congress had officially transmitted the Constitution to the states—or whether the Assembly should postpone such an important issue until after the state elections that were scheduled to take place on October 9.

The decision was political: Federalists had a comfortable majority in the outgoing Assembly and thus they would have no trouble calling a convention that would meet in Federalist-dominated Philadelphia. Anti-Federalists, aware of their weakness in the Assembly, sought to delay the decision on a convention until after the state elections, hoping that they would win control of the legislature. On September 28 a vote was taken and a convention was authorized; the Assembly, however, adjourned for the day without passing the necessary measures for implementing the call of the convention. Anti-Federalists tried to take advantage of the gap. When the Assembly reconvened the next morning, the last scheduled day of the legislative session, Anti-Federalists boycotted the session, thus depriving the Assembly of the two-thirds majority it needed for a quorum. The sergeant at arms was sent to corral the necessary seceding assemblymen to obtain a quorum. This officer reported that he had chased Anti-Federalists up and down the streets and alleys of Philadelphia, but he returned empty-handed. A mob of Philadelphians, however, was not so timid. Two seceding Assemblymen were forcibly returned to the chamber and the necessary implementation legislation was enacted for the convention.

Pennsylvania held its election for convention delegates on November 6, 1787. Even before the convention met in Philadelphia on November 20, it was widely known that two-thirds of the delegates were ardent Federalists. The convention debated the Constitution by paragraphs for three weeks before voting 46 to 23 to ratify on December 12. The minority was not allowed to enter its objections on the convention journals and a proposed bill of rights was similarly kept off the record. Anti-Federalists had lost the first major battle in the state conventions, but Federalists were hurt by the tactics they had used to obtain ratification. Even though the convention had ratified the Constitution, Pennsylvania's population still remained fiercely divided, and a petition campaign was begun to undo the convention's action.

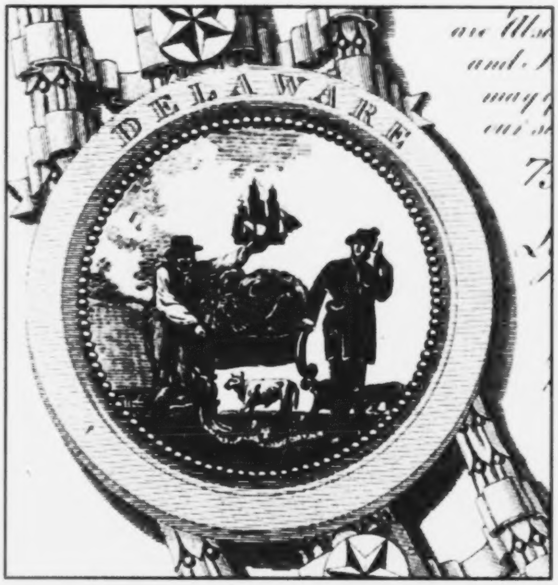
On December 7, five days before Pennsylvania ratified, Delaware's convention adopted the Constitution unanimously. New Jersey and Georgia likewise ratified without dissent before the end of 1787, while Connecticut ratified by a three-to-one majority on January 9, 1788. The stage was thus set for the most important event in the entire ratification struggle, the Massachusetts convention.

On January 3, 1788, ten of Boston's twelve delegates to the Massachusetts convention attended a dinner caucus. Anti-Federalist Governor John Hancock, ostensibly ill with the gout, declined the invitation. But Sam Adams did come, and he there broke his long public silence on the Constitution. Adams declared that he opposed the Constitution and would work against it in the state convention.

In response to this potent threat, Federalist leaders called a meeting of Boston's tradesmen—Adams' base of political support. The four hundred tradesmen who assembled did not agree with Adams; instead they expressed strong support for the Constitution, and they warned the Boston delegates that a vote against the Constitution would be "contrary to the best interests, the strongest feelings, and warmest wishes of the Tradesmen of the town of Boston."

Still, the convention, elected between mid-November 1787 and early January 1788, reflected Massachusetts' Anti-Federalist majority. When the convention assembled, Governor Hancock was elected president. Again, however, his gout flared up (a familiar reaction to difficult political problems) and he stayed away. With him absent, Federalists were able to make significant inroads into the large Anti-Federalist majority, but they realized that if a vote were taken, the Constitution would still be defeated.

In an effort to win over the votes to tip the balance, Federalists decided to recommend amendments to the Constitution. The bargain they proposed was that the convention would ratify the Constitution unconditionally, but it would instruct the state's representatives and senators in the first federal Congress to support certain amendments to the Constitution. To insure a warm reception for these amendments, Federalist leaders approached Governor Hancock, their arch political enemy, asking him to present the amendments to the convention as his own. In return, Federalists promised not to run a candidate opposite him in the spring gubernatorial elections and to support his election to the Vice Presidency of the United States. Then, if Virginia did not ratify the Constitution (leaving George Washington ineligible), Hancock would be the obvious choice for President.



The bait was strong. Hancock's gout improved; he attended the convention and proposed "his" amendments. Sam Adams, the consummate politician, seeing that ratification was now inevitable, jumped on the bandwagon. The final vote was taken on February 6 and the convention ratified the Constitution by a narrow nineteen-vote margin—187 to 168.

Federalists nationwide were relieved. James Madison found "the amendments . . . a blemish, but . . . in the least offensive form." Anti-Federalists such as Patrick Henry scoffed that Massachusetts had "put the cart before the horse." But after seeing Massachusetts' amendments, Thomas Jefferson changed his mind about the best procedure to follow in ratifying the Constitution:

> *My first wish was that 9 states would adopt it in order to ensure what was good in it, & that the others might, by holding off, produce the necessary amendments. But the plan of Massachusetts is far preferable, and will I hope be followed by those who are yet to decide.*
>
> **Thomas Jefferson to Edward Carrington, 27 May 1788 *(Thomas Jefferson Papers, Library of Congress)***

As it turned out, Jefferson's second wish came true; six of the remaining seven states used the

MASSACHUSETTS

Massachusetts technique of ratifying the Constitution unconditionally, at the same time proposing amendments. This process saved the Constitution. Massachusetts' decision was the turning point in the ratification struggle.

But the impact of Massachusetts' action was not quickly apparent. Reports that had been circulating of North Carolina's ratification proved false. Then, the New York legislature barely passed a resolution calling for a state convention, illustrating the difficulty the Constitution faced in that state. Luther Martin's accounts of the serious divisions within the Constitutional Convention became widely publicized at the same time revealing that the Convention had not been so unanimous as the public had been led to believe. Then, on February 21, 1788, a bombshell hit. The seemingly safe New Hampshire convention adjourned without ratifying the Constitution. Federalists all over the country had thought that the Massachusetts ratification signalled the end to the struggle. No one dreamt that a problem would arise in New Hampshire, which was expected to follow Massachusetts' lead. Worse, Federalists in the New Hampshire convention reported that a vote in the convention would have meant a rejection of the Constitution; a majority of delegates either opposed the new government or were instructed by their towns to vote against it. A month later, on March 24, a statewide referendum in Rhode Island overwhelmingly defeated the Constitution 2,708 to 237.

The events of February and March had a sobering effect on Federalists. Their bandwagon had been halted. Now, they saw a need for strenuous efforts to ratify the Constitution in the next scheduled state conventions in Maryland and South Carolina.

Maryland's convention began on April 21; the outcome was critical. George Washington wrote to a Maryland Federalist, "Decisions, or indecisions then with you, will in my opinion, determine the fate of the Constitution, and with it, whether peace and happiness—or discord and confusion is to be our lot." Maryland Anti-Federalists proposed a postponement so they could confer with the Anti-Federalist Virginians, whose convention was scheduled for June. Washington feared that a Maryland adjournment might "stagger" South Carolina. North Carolina would side with Virginia and everyone knew that New York was strongly opposed to the Constitution. Thus, knowing the importance of their states, Federalists in Maryland and South Carolina (whose convention started on May 12) resisted delay. They used their majorities in both conventions to steamroll the Constitution through by votes of 63 to 11 and 149 to 73. Maryland's convention had met for only nine days and South Carolina's for only thirteen.

The second session of the New Hampshire convention then met on June 17 and four days later ratified the Constitution, recommending amendments by a vote of 57 to 47. New Hampshire was the crucial ninth state. Whatever else happened, the Constitution had been adopted.

But even with nine states assenting to the Constitution, the Union would have difficulty surviving without Virginia and New York. The refusal of these two large states to ratify the Constitution would have divided the new union into three entities—New England, the Middle States, and the extreme South. Everyone recognized the importance of Virginia and New York, and both Federalists and Anti-Federalists exerted their strongest effort in these states.

In Virginia, George Mason and Patrick Henry led the Anti-Federalists. Henry urged the convention not to be swayed by the other states. If the Constitution was "wisely constructed," he counseled, "let us receive it." But, he continued,

> *shall its adoption by eight States induce us to receive it, if it be replete with the most dangerous defects? They [Federalists] urge that subsequent amendments are safer than previous amendments, and that they will answer the same ends. At present we have our liberties and privileges in our own hands. Let us not relinquish them. Let us not adopt this system till we see them secured. There is some small possibility, that should we follow the conduct of Massachusetts, amend-*

> *ments might be obtained. There is small possibility of amending any Government; but, Sir, shall we abandon our most inestimable rights, and rest their security on a mere possibility?*
>
> **Speech in Virginia convention, 7 June 1788**
> ***(Virginia Debates*, I, 142–43)**

Without substantial amendments, Virginia Anti-Federalists believed that the Constitution would "destroy the State Governments, and swallow the liberties of the people." In response to these arguments, James Madison and Governor Edmund Randolph—now a convert to the Federal side—maintained that the Confederation was "too defective to deserve correction." "Let us take farewell of it," they advised, "with reverential respect, as an old benefactor. It is gone, whether this House says so, or not." The Constitution alone could save the Union, Madison and Randolph claimed. And they prevailed. A small majority voted 89 to 79 on June 25, 1788 to ratify the Constitution unconditionally, recommending amendments.

Virginia's acceptance brought New York's. Over two-thirds of New York's convention opposed the Constitution; but, after hearing about ratification in New Hampshire and Virginia, a group of Anti-Federalists broke away from Governor George Clinton's Anti-Federalist party and voted on July 26, 1788 for unconditional ratification, with amendments recommended. New York's support, they believed, was needed in the first federal Congress to get a bill of rights and the other amendments proposed. Without New York's participation in Congress no amendments would be submitted to the states and New York would be isolated. It was, according to Anti-Federalists,

> *our object to improve the plan proposed: to strengthen and secure its democratic features; to add checks and guards to it; to secure equal liberty by proper Stipulations to prevent any undue exercise of power, and to establish beyond the power of faction to alter, a genuine federal republic.*
>
> **Nathan Dane to Melancton Smith, 3 July 1788**
> ***(John Wingate Thornton Collection, New England Historic Genealogical Society, Boston, Mass.)***

Thus the people of the United States created a viable union. On September 13, 1788, the Confederation Congress passed an ordinance providing for the first federal elections, and on March 4, 1789, the first Congress under the Constitution assembled. The two remaining states—North Carolina and Rhode Island—ratified the Constitution in November 1789 and in May 1790, respectively.

It had taken a long, bitter struggle to ratify the Constitution. Amazingly, however, the revolution in favor of government was accomplished peacefully. The opposition was loud enough to convince the new Congress under the Constitution to propose a bill of rights which was soon adopted by the states. Anti-Federalists had made a significant contribution. In the words of Thomas Jefferson, there had "been opposition enough to do good, & not enough to do harm."

The country had, in essence, gone through a second revolution. Americans had exchanged a weak confederation of states for a potentially strong national government. The new Constitution, unlike the Articles of Confederation, could realistically be amended and could be regularly interpreted by the judiciary. With these two safety valves, the Constitution would endure, alive and vital.

Suggested additional readings:

Max Farrand, *The Framing of the Constitution of the United States* (1913).
Merrill Jensen, *The Making of the American Constitution* (1964).
Jackson Turner Main, *The Antifederalists: Critics of the Constitution, 1781–1788* (1961).
Carl Van Doren, *The Great Rehearsal: The Story of the Making and Ratifying of the Constitution of the United States* (1948).

John P. Kaminski is the director of *The Documentary History of the Ratification of the Constitution* and The Center for the Study of the American Constitution at the University of Wisconsin-Madison.

State Constitutions: Pillars of the Federal System

by A. E. DICK HOWARD

State constitutions spring from a tradition distinct from that of the document drafted at Philadelphia in 1787. A study of state constitutions, their history, and their development reveals basic assumptions, a philosophical framework, a level of discourse, and an array of usages that set them apart from the United States Constitution. Hence, as the nation celebrates the Bicentennial of the federal document, state constitutions merit special attention in their own right.

Early State Constitutions

In 1776, when Virginia's convention instructed its delegates in Congress to introduce the resolution for independence, it set to work on a frame of government and a declaration of rights. George Mason, of Fairfax County, played a central role in the drafting of both documents. His Declaration of Rights provided the model for the bills of rights subsequently adopted in the other states, and it foreshadowed the Bill of Rights added to the United States Constitution in 1791.

Revolutionary conventions or legislative assemblies drafted the first state constitutions, usually without referendum. At that early stage in thinking about constitutions, the notion of a convention elected for the express purpose of drafting a constitution—distinct from bodies elected to enact ordinary laws—was not well developed. Massachusetts set a pattern for the future when, in 1780, its citizens elected a convention specifically charged with drafting a constitution which was then submitted to the voters for their approval.

The first state constitutions differed in some specific provisions. For example, states followed varying practices regarding the manner of choosing a governor, the number of houses in the legislative branch (some were bicameral, others unicameral), legislators' terms of office, and provisions for the franchise.

The drafters of the first state constitutions were, however, in general agreement on many major issues. Those framers did not produce abstract tracts on political theory; they grounded the first constitutions in Americans' experience during the colonial era. Thus state constitutions reflected a belief in limited government, the consent of the governed, and frequent elections. They incorporated a Whig tradition emphasizing direct, active, continuing popular control over the legislature in particular and over government in general.

Notwithstanding declarations about the separation of powers, the first state constitutions in fact made the legislature the dominant branch of government. In the years before the revolution, governors and judges, appointed by the Crown, often provoked popular mistrust. The American colonists saw their legislatures as speaking for the people's liberties. Not surprisingly, legislative primacy carried over into the original state constitutions.

State governors were, by contrast, virtual ciphers. Only in New York and Massachusetts did the people elect the governor. In the other states the legislature elected the governor, who lacked the power of veto and who executed the laws with the advice of a council of state chosen by the legislature.

Nor did state courts, at the outset, have much more status. The first state constitutions did not formally embody the principle of judicial review—the power of a court to declare a legislative act unconstitutional—just as that doctrine was not explicitly spelled out in the United States Constitution. Gradually, after 1776, courts in several states began to declare and exercise the power of judicial review (thus anticipating John Marshall's reasoning in his 1803 decision in *Marbury* v. *Madison*).

In the two centuries since the adoption of the first state constitutions, the evolution of those documents has reflected the great movements and controversies of American history. The early years of the nineteenth century brought the pressures of Jeffersonian and Jacksonian democracy, growth in the country's population and economy, and westward migrations. States rewrote their constitutions in ways that reflected the imperatives of that age. Revisers progressively abolished property qualifications for voting, more nearly equalized representation in state legislatures, gave governors more power and status, placed limits on legislative powers (as people discovered that legislators, too, were capable of actions inimicable to the common good), and made explicit provisions for the revision and amendment of constitutions (a subject often neglected in the original documents). A central theme of state constitutional reform in the early decades of the nineteenth century was, in short, the extension of popular control over government.

The years of Civil War and Reconstruction stirred another period of great activity in the writing and rewriting of state constitutions. Between 1860 and 1875, eighteen states adopted new or revised constitutions. Revisers focused on issues of economic regulation—governmental responses to the building of railways and the activities of banks and corporations. In the South, race was an issue. Recon-

State constitutions reflected a belief in limited government, the consent of the governed, and frequent elections. They incorporated a Whig tradition emphasizing direct, active, continuing popular control over the legislature in particular and over government in general.

struction constitutions obliged former Confederate states to respect the rights of the newly freed slaves. With the end of Reconstruction, southern states rewrote their constitutions, often institutionalizing "Jim Crow" and achieving widespread disenfranchisement of blacks through registration and other requirements.

Twentieth Century

State constitutions mirrored the era of populism and progressive reform movements. Progressives pressed for forms of direct government—the initiative, referendum, and recall (Oregon leading the way). By the mid-1920s, 19 states had adopted constitutional provisions for popular initiative of legislation, 14 states had provided for initiative of constitutional amendments, 21 states for referenda, and ten states for recall measures.

Concurrently with the rise of expanded notions of the roles of government, including the delivery of services, some observers began to seek to recast state constitutions in a managerial mode. Where the first state constitutions had emphasized direct and active popular control over government, the managerial model emphasized efficiency and rational administration.

A managerial conception of government has its roots in the thinking of Alexander Hamilton. He stressed the importance of executive leadership, preferring, in the national government, more centralization of power under a strong president. (On this issue, of course, Hamilton and like-minded Federalists clashed with Jeffersonian Republicans of the time.) In the nineteenth century, managerial ideas of government gained ground under the influence of Bismarck's Germany and, in the United States, with the concept of public administration promoted by, among others, Woodrow Wilson.

In the twentieth century, "good government" groups sought to "streamline" state government. They argued that state constitutions should be revised to give more power to the governor, make fewer offices elective (by way of the "short ballot," thus concentrating more power in the executive branch), focus control of the state's administration, and create a civil service. The paradigm of this kind of state charter is the National Municipal League's Model State Constitution (first drafted in 1921 and now in its sixth edition).

Between 1921 and 1945 no state adopted a new constitution, but the years since World War II have been active ones. Some of the impetus has come from the states' greater role in the delivery of services (often implementing federal programs). In 1955 the Kestnbaum Commission declared that state constitutions made it "difficult for many states to perform all of the services their citizens require, and consequently have frequently been the underlying cause of state and municipal pleas for federal assistance."

Another impetus for state constitutional revision came with reapportionment of state legislatures. The Supreme Court's "one-person, one vote" decision in *Reynolds* v. *Sims* (1964) made it easier to win acceptance of moves to rewrite state constitutions. Between 1950 and 1980 twelve states (among them Virginia) adopted new constitutions.

State Constitutional Law

During much of the twentieth century, judges, lawyers, and scholars have often neglected state constitutional law. Several factors induced this decline of interest in state constitutional law. Too often the states had an unimpressive record in protecting individual rights. Guarantees in state constitutions frequently went unenforced by state courts. In southern states, for example, courts interpreted state constitutions as allowing legislatures to undertake a barrage of "massive resistance" measures (including even the closing of public schools) aimed at preventing desegregation in public education.

The activism of the Warren Court further eclipsed state constitutional law. During the tenure of Earl Warren, the Supreme Court became an engine of reform, decreeing reapportionment of legislative seats, mandating an end to racial segregation in public programs, and working something of a revolution in criminal justice. During those highly charged years, state courts could do little more than try to keep pace with the high court's opinions. State judges had little time or opportunity to see to the development of doctrine under state constitutions.

The academic community played a part in emphasizing the primacy of federal constitutional law. Many professors and scholars, especially those writing about constitutional law, aspire to a national reputation. The United States Constitution and the Supreme Court are popular subjects for commentary. With such orientation to national issues, state constitutional law tended to be neglected.

Recent years, however, have brought a revival of interest in state constitutional law. While the Burger Court (1969–1986) was no stranger to activism (the Court's controversial abortion decisions being examples), the headlong pace of the Warren years seemed to slacken. In criminal justice deci-

Lawyers are realizing the importance to their clients of understanding that a state's constitution may, in a given case, offer an attractive alternative to reliance solely on the United States Constitution.

sions, in particular, the Court cut back on earlier trends to impose national standards on state criminal procedures.

The states themselves have become healthier entities. Once again the states merit the label of social and political "laboratories" that Justice Louis Brandeis once attached to them. Partly as a result of the reapportionment of state legislatures, the states have undertaken bolder attacks on the great problems of our time. State government has been revitalized, its administration improved, its spirit refurbished.

Trends in national politics in the 1980s have obliged the states to accept more responsibility. President Reagan's calls for deregulation, for a "new federalism," and for less stress on the role of the Federal Government have spotlighted the place of the states in the American polity. State governors more often become national figures; our two most recent presidents were governors before assuming the nation's highest office.

Virginia's Commission on Constituional Revision, reporting in 1969 to the Governor and General Assembly, caught the spirit of the times. The Commission premised its report on a belief "that the people of Virginia want to shape their own destiny, that they do not want to abdicate decisions to others, such as the Federal Government, and that therefore they want a constitution which makes possible a healthy, viable, responsible state government." Even though many provisions in Virginia's Bill of Rights have parallels in the Federal Bill of Rights, the commissioners saw "no good cause not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians."

State courts, too, have caught the spirit. In the 1960s, mistrust attached to state courts (at least, such seemed the tone of many United States Supreme Court opinions). Today, state courts are far more professional and much better equipped to do their job than was true even a few years ago. State courts now have professional administrators, and respected institutions (such as the National Center for State Courts at Williamsburg) promote the welfare of state courts.

One finds ample evidence that state courts have begun to take state constitutions seriously. Some of the country's leading state judges, such as Oregon's Hans Linde and California's Stanley Mosk, have called for a renaissance of state constitutional law. Scholars and law reviews no longer neglect the subject. Lawyers are realizing the importance to their clients of understanding that a state's constitution may, in a given case, offer an attractive alternative to reliance solely on the United States Constitution.

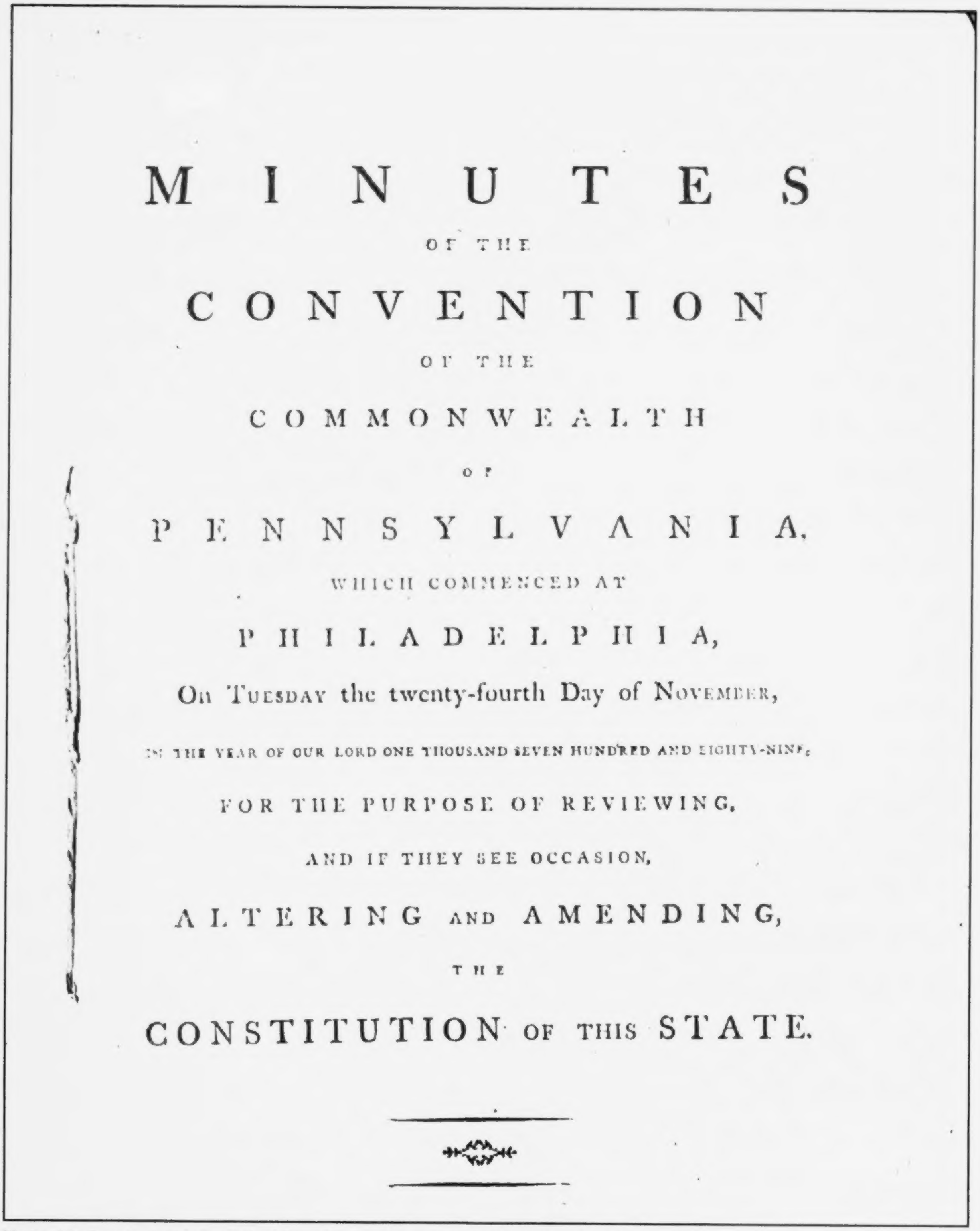
A state court, in interpreting a state constitution, need not tie its reading of that document to the meaning of the Federal Constitution. A state judge must, of course, enforce the United States Constitution, just as does a federal judge. But the state and federal constitutions are separate documents, each to be enforced in its own right, independently of the other.

Thus, while a state court cannot do less than the Federal Constitution requires, the court can look to the state constitution for imperatives quite beyond anything found in federal constitutional law. The United States Constitution places a floor beneath which a state and its courts may not fall. But the federal document does not preclude a state's shaping a body of state constitutional law independent of that based upon the United States Constitution. Indeed, if a state court decides that a state statute or other action violates the state constitution, such a ruling, of itself, raises no federal question, the United States Supreme Court will decline review of the case (citing the "adequate and independent state ground" doctrine).

Examples of state courts' looking to state constitutions suggest the range of possibilities. Sometimes the state courts use state constitutions where the United States Constitution has little or nothing to say about the problem at hand. Other times a state court will use the state charter in an area in which federal doctrine exists but there is room for additional state interpretation. Several areas of adjudication will help illustrate.

Economic regulation. Since 1937, the Supreme Court has backed off from using the Fourteenth Amendment's due process clause to oversee how the states order their economic affairs (although, of course, questions may arise under the commerce clause or some other provision of the Constitution). Some state courts, however, continue to review economic regulations closely. Nebraska's Supreme Court, for example, has said that it will review state statutes, such as those restricting competition, to guard against "pressure groups which seek and frequently secure the enactment of statutes advantageous to a particular industry."

Church and state. In a series of decisions the Supreme Court has invalidated state programs channeling state money to the support of religious schools. In this area, the Court has been quite strict. The justices have, however, recognized that some programs, such as reimbursement for the cost of bus trans-



MINUTES
OF THE
CONVENTION
OF THE
COMMONWEALTH
OF
PENNSYLVANIA,
WHICH COMMENCED AT
PHILADELPHIA,
On Tuesday the twenty-fourth Day of November,
IN THE YEAR OF OUR LORD ONE THOUSAND SEVEN HUNDRED AND EIGHTY-NINE,
FOR THE PURPOSE OF REVIEWING,
AND IF THEY SEE OCCASION,
ALTERING AND AMENDING,
THE
CONSTITUTION OF THIS STATE.

Minutes of the Pennsylvania State Constitutional Convention, November 24, 1789. The Historical Society of Pennsylvania.

portation for children attending parochial schools, are permissible under what has come to be called the "child benefit" theory (that the program is seen as aiding the students, not the schools). Such programs may, however, be struck down under some state constitutions, many of which have quite detailed and specific prohibitions against aid to religions, provisions whose specificity contrast with the general language of the First Amendment.

Criminal procedure. Through a process of "incorporation," most of the provisions of the Bill of Rights (originally adopted to bind the Fed-

In state constitutions, the people of the states record their moral values, their definition of justice, their hopes for the common good. A state constitution defines a way of life.

eral Government) have come to apply to the states. Even in this highly "federalized" area of constitutional law, state constitutions play a role. In some instances a state constitution may explicitly require a standard not laid down in federal cases. For example, whereas the Supreme Court has said that states may have juries of fewer than twelve jurors in criminal cases, most state constitutions expressly command a jury of twelve. In other instances, a state court may construe a state constitutional provision similar to a federal provision as implying a higher standard of conduct. Thus courts in some states have read the state ban on unreasonable searches and seizures as forbidding police actions that might be upheld under the Supreme Court's Fourth Amendment decisions.

Environment. Although there has been considerable federal legislation protecting the environment (such as the National Environmental Protection Act), federal courts have refused to recognize a federal constitutional right to a decent environment. State constitutions have much to say about environmental protection. For example, New York's Constitution imposes restraints on the use of public lands and resources and Illinois' Constitution authorizes citizens' suits to protect the environment.

Education. The Supreme Court has refused to use the Fourteenth Amendment to require that states equalize expenditures among wealthier and poorer school districts. While total deprivation of education (as for aliens) would raise serious federal constitutional questions, the Court's ruling on school finance leaves the issue of comparative inequalities among school districts largely to state law.

In contrast to the United States Constitution, state constitutions have detailed provisions on education. They typically address at length the powers and duties of the state and of localities in creating and running school systems. The Supreme Court of New Jersey concluded that the state constitution's mandate of "a thorough and efficient system of public schooling" required equal educational opportunities for the state's children. Thus the court struck down a public school financing system that relied heavily on local taxation.

Judicial decisions based on a constitution, whether state or federal, trigger inevitable tensions between two principles, both built into our system of government. One is the principle that decisions should be made by agents ultimately accountable to the society's electors. The other principle is that of judicial review: the power of a court to enforce the commands of the Constitution, even in the face of a legislative or popular majority.

A states' voters have various ways of expressing discontent with judicial decisions. In some states, judges stand for reelection, and their decisions may be a topic for debate in that election (the successful campaign mounted by conservatives against California's Chief Justice, Rose Bird, attracted national attention).

More generally, it is far easier to amend a state constitution than it is to amend the United States Constitution. Voters have used this power. Constitutional amendments in California and Florida, emphasizing the rights of the victims of crime, have curbed state courts' ability to suppress the introduction of evidence challenged to being the product of an illegal search or seizure. In Massachusetts and California, constitutional amendments have overturned court decisions which had invalidated the death penalty on state constitutional grounds.

A Federal System

No function of a constitution, especially in the American states, is more important than its use in defining a people's aspirations and fundamental values. In state constitutions, the people of the states record their moral values, their definition of justice, their hopes for the common good. A state constitution defines a way of life. George Mason understood that precept when, in drafting Virginia's Declaration of Rights in 1776, he wrote that "no free government, nor the blessings of liberty, can be preserved to any people" but by a "frequent recurrence to fundamental principles."

A study of constitutionalism in the United States is incomplete if one considers only the Federal Constitution. That document deserves all the attention we can give it. But those who drafted it understood that an enduring and viable federal system rested as well on the pillars of the state constitutions. Through those constitutions the people of the respective states structure governments closer to them than they find in Washington. Pluralism and a dispersal of power buttress our free society. Maintaining the state constitutions in good repair and understanding their postulates help us move forward with a system of government that has served us well for two centuries and gives hope and promise for the next century and beyond.

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A. E. Dick Howard is White Burkett Miller professor of law and public affairs, University of Virginia. He is the author of *The Road from Runnymede: Magna Carta and Constitutionalism in America* (University Press of Virginia, 1968).

Charles A. Beard's Economic Interpretation of the Origins of the Constitution

by ELLEN NORE

It was 1913. The red-haired, confident thirty-nine-year-old professor of American politics and government at Columbia University had just published his seventh book, *An Economic Interpretation of the Constitution of the United States*. Though the author modestly described it as a "long and arid survey—partaking of the nature of a catalogue," the book was an immediate *succès de scandale*; it has influenced the written history of the Constitution's creation ever since.

The professor, of course, was Charles A. Beard, his thesis became known as the Beardian interpretation of the Constitution. Few other interpreters achieved a position of such intellectual dominance.

However, his argument met resistance—some of it intense—early in the game. "SCAVENGERS, HYENA-LIKE DESECRATE THE GRAVES OF THE DEAD PATRIOTS WE REVERE," read the headline of the Marion *Ohio Star*. The editor who wrote it had not even read what he called Beard's "libelous, vicious and damnable" book of "filthy lies and rotten aspersions."

What did Beard say? Put simply, Beard asserted that the Constitution was not the work of "the whole people," as generations of schoolchildren had been taught; it did not represent the interests of the entire society of common folk, men and women, free and unfree. Rather, it had been written by a group of wealthy individuals with specific economic policies in mind, policies that would benefit themselves.

If Beard alleged that the founding fathers had ulterior private motives for framing the government as they did, it is fair for us to ask about his own motives in framing his argument. While not part of any political party, Beard stood among the heterogenous flock of men and women all over America who were trying to develop a "New Politics" of democracy for the mature industrial society. New York City, with its multitude of foreign-born and first-generation Americans and its often reactionary elites, looked to these "Progressives" to be a "living laboratory" for public policy. Confident that reason and modern science applied in a democratic context could solve or mitigate many urban problems, Progressives believed that active citizenship was a duty and they sought to shift the direction of public policy toward active government.

Changes in public policy to meet the needs of urban America demanded, Beard thought, a changed view of the history of the Constitution. Beard presented the Constitution not as an ***historic*** document but as an ***historical*** document, a public law containing many clauses representing the interests of men of property and social standing in the eighteenth century. If the founding fathers had written the Constitution with their own public policy goals in mind, why should not progressives and democrats on the courts in 1913 rewrite it through interpretation to meet the needs of urbanizing America in the twentieth century?

Beard's Argument

Thus, writing about the Constitution in 1913, Beard asked this question: "Did they [the members of the Convention] represent distinct groups whose economic interests they understood and felt in concrete, definite form through their own personal experience with identical property rights, or were they working merely under the guidance of abstract principles of political science?" He also answered it: The Constitution was a collection of public policies suited to the late eighteenth century, a set of policies which clearly reflected the priorities of those who had drawn up the document. "The people" who ordained and established the Constitution were, said Beard, white, male property-owners who wanted to fund the public debt left from the War for Independence and to eliminate certain threatening aspects of popular government under the Articles of Confederation, such as paper money inflation and "stay laws," which impaired the obligation of contract between debtors and creditors. Significant groups in the population—slaves, women, indentured servants and males without property—had had no part in framing, promoting or implementing the new government, and consequently their interests were not reflected in the Constitution.

Having established that "the people" forming the "more perfect union" were politically active white, male property-owners, Beard then divided these persons into two main economic interest groups. First, there were holders of real estate (among them smaller farmers with debts, manorial lords, and slaveholders of the South). Then there were personal property holders (creditors, holders of public securities, manufacturers and shippers, and speculators in Western lands). Under the Articles of Confederation, the latter group, "personalty" (holders of personal property), was, Beard argued, experiencing difficulty and "was, in short, the dynamic element in the movement for the new Constitution."

Using the imaginative and novel technique of collective biography, Beard centered *An Economic Interpretation of the Constitution* on a survey of the economic interests

What did Beard say? Put simply, Beard asserted that . . . [the Constitution] had been written by a group of wealthy individuals with specific economic policies in mind, policies that would benefit themselves.

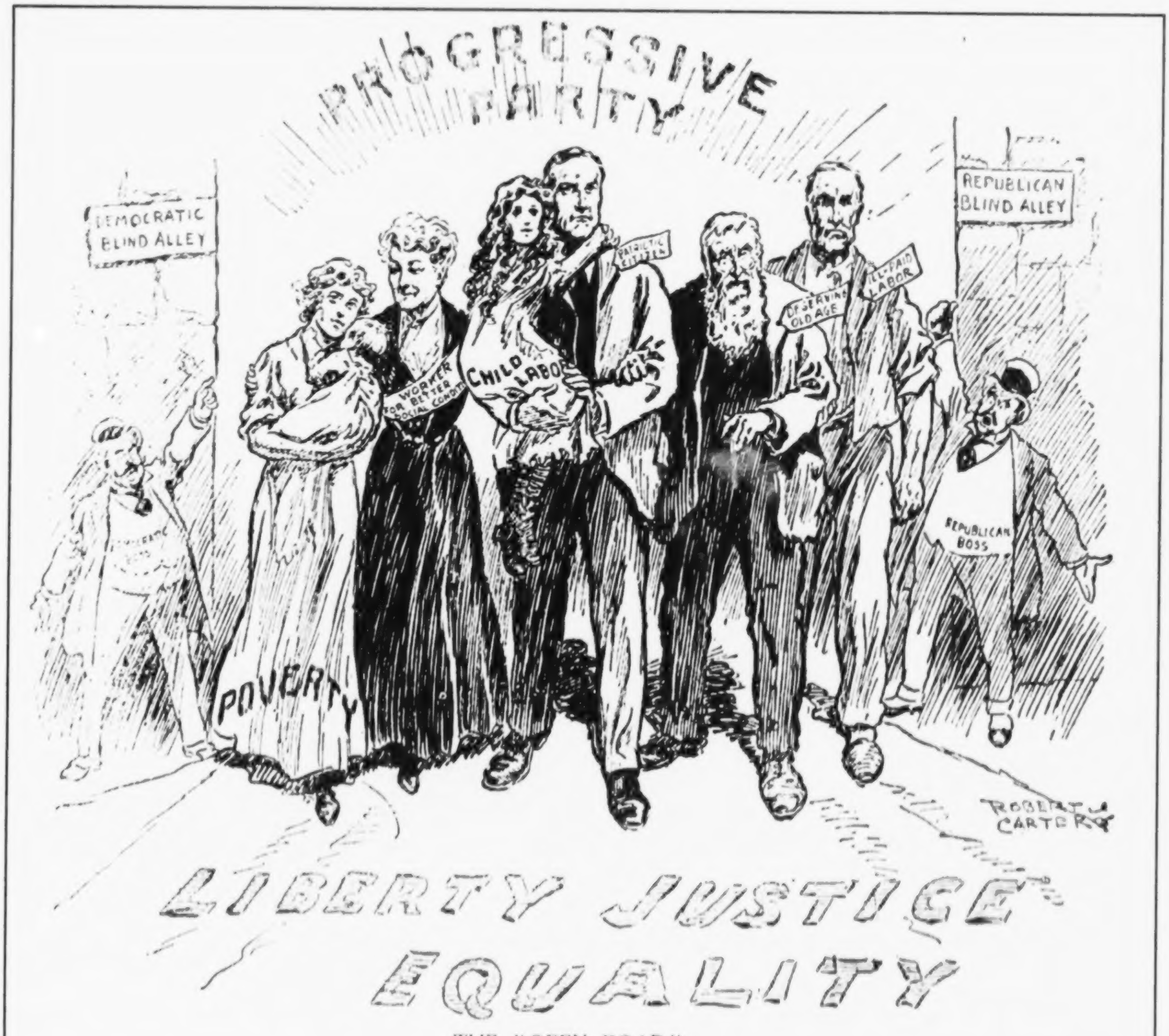
of the members of the Convention. A majority of the delegates in Philadelphia, he found, were lawyers from towns or coastal regions, and the dusty *Records* of the Treasury Department of 1790, a source Beard was the first historian to use, showed him that 40 of the 55 members who attended the Convention were listed as holders of public securities. Reading backwards, Beard assumed that holders of securities in 1790 had also been holders in 1787. "Economic biographies" of the members of the Convention revealed still other economic interests that would be secured under the new government. Fourteen of the 55 were speculating in public lands, 24 were involved in loaning money at interest, "at least" 11 members represented "personalty in mercantile, manufacturing, and shipping lines," and "at least" 15 members represented "personalty in slaves."

Beard conceded that superficial students of the Constitution might have difficulty thinking of it as an economic document. The Constitution did not explicitly recognize the economic interest groups Beard had outlined, nor did it mention property qualifications on voting or office holding; criteria for determining who voted were left to the states. Yet, he maintained that the "true inwardness" of the Constitution was directly revealed in the "correspondence of the period, contemporary newspapers and pamphlets, the records of the debates in the Convention at Philadelphia and in the several state conventions, and particularly *The Federalist*." He also focused on the government's positive powers: the power to tax, to raise military forces, and to control foreign and interstate commerce, as reflections of "the strong impulse of economic forces in the towns and young manufacturing centers. "In a few simple words," he concluded, "the mercantile and manufacturing interests wrote their *Zweck im Recht* [concrete interests into the law], and they paid for their victory by large concessions to the slave-owning planters of the South." Thus, the Constitution prohibited interference with the international trade in captive people until 1808, required return of fugitive slaves, and allowed for three-fifths of the people in slavery to be counted for purposes of congressional representation and taxation.

Two clauses in particular, Beard argued, embodied demands of "personalty" against the agrarians: States could not issue paper money, and they could not make laws impairing the obligation of contracts. The latter prohibition arose from the fact that some states had passed "stay laws" during the depression-ridden 1780s. These laws had interfered with contracted loans between debtors and their creditors by delaying payment or changing the nature of payment. Beard pointed out that politicians of the eighteenth century could frankly recognize "class rights." They "were not under the necessity," as were "modern partisan writers," of clouding "the essential economic antagonisms featuring in law and constitution making. Their clarity of thought," Beard observed, "was greatly facilitated by the disfranchisement of the propertyless, which made it unnecessary for political writers to address themselves to the proletariat and to explain dominant group interests" in such a way that they appeared "in the garb of 'public policy.' " Beard wanted to take "the founding fathers" out of the cloud-strewn realms of Gilbert Stuart's paintings of disinterested public servants and to portray them as men of flesh and blood with their feet firmly on the ground and their minds on their own interests.

Continuing his theme, the Constitution as the work of a restricted group of interested men, Beard reminded readers that there had been no direct popular vote taken on the Constitution. Using secondary accounts, scattered records of ratifying conventions in the states, and Treasury Department records, Beard attempted to generalize his thesis about the Convention of Philadelphia into a hypothesis that would describe the alignment of economic interests in the states. He was not prepared, he said, to do "a study of the natural history" of approximately 160,000 men involved in the adoption of the Constitution in the states. A glance at the economic interests represented in conventions of the states suggested to Beard that those conventions did not "seem to have been more 'disinterested' than the Philadelphia convention"; in fact, "the leading champions of the new government appeared to have been mostly "men of the same practical type, with actual economic advantages at stake." "Almost uniformly" the opponents came from farming regions and from areas "in which the debtors had been formulating paper money and other depreciatory schemes." Contemporary accounts, Beard thought, supported his hypothesis that during the election of delegates to the ratifying conventions in the Sates, there had been "a deep-seated conflict between a popular party based on paper money and agrarian interests, and a conservative party centered in the towns and resting on financial, mercantile, and personal property and interests generally."

Beard aimed his final sentences directly at his selected audience of judges, lawyers, and students of


PROGRESSIVE PARTY
DEMOCRATIC BLIND ALLEY
REPUBLICAN BLIND ALLEY
PATRIOTIC CITIZEN
DESERVING OLD AGE
ILL-PAID LABOR
FOR WORKER BETTER SOCIAL CONDITIONS
CHILD LABOR
POVERTY
DEMOCRATIC BOSS
REPUBLICAN BOSS
ROBERT CARTER
LIBERTY JUSTICE
EQUALITY

THE "OPEN ROAD"

"I suppose you know the force that is behind the new party that has recently been formed—the so-called Progressive party. [illegible] force of discontent with the regular parties of the United States. It is the feeling that men have gone into blind alleys [illegible] often enough, and that they propose to find an open road for themselves."—WOODROW WILSON
From the *Journal* (Boston)

Illustration from **American Review of Reviews**, *v. 46, 1912, p. 423. Library of Congress.*

public law:

> The Constitution was not created by 'the whole people' as the jurists have said; neither was it created by 'the states' as Southern nullifiers long contended; but it was the work of a consolidated group whose interests knew no state boundaries and were truly national in their scope.

Thus, Beard concluded, the Constitution reflected the spirit of these eighteenth-century conflicts; it was not a set of eternal prescriptions. In the twentieth century, it must become a Constitution based upon twentieth-century relations of production and consumption in a democratic setting. Professors, judges, lawyers, and managers of corporations who thought in formal, static terms about the law were wrong.

Beard confided to a student something of the spirit in which he wrote this book: "The thing to do is to lay a mine, store it with nitro, and then let it off in such a fashion that it rips the bowels out of something important, making it impossible for the fools to travel that way any more."

The Response

An Economic Interpretation fared badly in reviews by Beard's highly respected academic colleagues. In the leading scholarly journal, *The American Political Science Review*, John Latané pointed out that the security holdings of six leading *supporters* of the Constitution—James Madison, Alexander Hamilton, James Wilson, George Washington, Gouverneur Morris and Charles Pinckney—totaled $21,046, according to Beard's figures, while a similar group of *opponents*, including Elbridge Gerry, Luther Martin, Oliver Ellsworth, and William S. Johnson, held securities amounting to $87,979.90. Thus, Beard's own estimates indicated that security holdings were not a

Beard's economic interpretation has been replaced . . . . Still, Beard's work deserves our respect. . . . He understood that ideas alone do not explain politics and public policy.

reliable basis for predicting men's outlook on the Constitution. Latané was willing to accept interpretations which stressed the economic nature of sectionalism or which allowed that members of the Convention had indeed been influenced by the economic interests of their constituents. But he concluded that Beard had not successfully demonstrated a connection between personal financial interests of members of the Convention and their position on the Constitution.

Other reviewers suggested that Beard's method—using the Treasury's records after 1790 to interpolate the security holdings of members of the Convention of 1787—was dubious—or, as one reader put it, "With all due respect, this is the most unmitigated rot.... Why should not former members of the Convention have invested their money in public securities in 1790 and the years following, when they saw these rising in value and becoming safe sources of income?" Beard's evidence showed only that *seven members* of the Convention, excepting Robert Morris, "had held public securities anterior to the meeting of the Convention," that these securities were worth less than $90,000, and that "fully two-thirds" of this amount belonged to Elbridge Gerry, who "however, was so little influenced by this consideration that he refused to sign the Constitution and opposed its adoption!" Another reviewer commented perceptively that *An Economic Interpretation* was "principally at fault in its lack of perspective; the period of constitution-making is too narrowly limited." Beard, he argued, had neglected the impact of the colonial and revolutionary experiences upon the founders.

Historian William K. Boyd asked Beard two searching questions about his hypothesis: "In the choice of delegates to the convention the 'personalty' interests were successful; if there was so much economic conflict between the farmers and the security holders and traders, how could this result have been secured when the landed class controlled the legislatures which elected the delegates?" and if the Constitution was so clearly an economic issue, then "why was so much of the opposition conciliated by promises of amendments (The Bill of Rights) in which questions of personal liberty and states' rights predominated?"

This critical fray left *An Economic Interpretation* tattered. Contemporaries saw that Beard's picture was out of focus. Yet Beard yielded nothing and reiterated his conclusions on the making of the Constitution with bravado at the close of *Economic Origins of Jeffersonian Democracy* (1915). In this sequel to his book on the Constitution, Beard insisted that the divisions over the Constitution were the origin of the Federalist and Democratic Republican party split which developed in the early Republic after 1790. It had been "established upon a statistical basis," he reiterated, that the Constitution had been "the product of a conflict between capitalistic and agrarian interests." Supporters of the new government had come "principally from the cities and regions where the commercial, financial, manufacturing, and speculative interests were concentrated"; opponents had come "from the small farming and debtor classes, particularly those back from the seaboard." Thus, Beard slipped under the barbed fence with his interpretive shirt noticeably full of holes.

Yet, the critical notices of astute contemporaries did not prevent *An Economic Interpretation* from becoming the dominant interpretation of the origins of the Constitution. Beard's relatively sophisticated treatment, as well as his message, found a hospitable audience, especially in the 1930s. In the late 1950s, however, scholars began to review Beard's sources. Forrest McDonald, in *We the People: The Economic Origins of the Constitution* (1958), looked closely at the economic interests of the fifty-five members of the Convention and argued that members of the Convention were not a cohesive group nor did they vote according to their economic interests. One-fourth of the delegates at Philadelphia had, as members of their state legislatures, been supporters of paper money or of laws relieving debtors. Another fourth of the delegates had economic relationships that were adversely affected by the Constitution they helped to write. Fixing his lens on the economic interests of thousands of males involved in ratification at the state level, McDonald demonstrated that the Beardian picture of creditors and security holders against agrarians did not appear as Beard had predicted. In fact, landed rather than fiscal property was dominant among both Federalists and Anti-Federalists. In some states, ratification was related to an entirely different set of issues from those Beard had presented. Georgia, for example, easily ratified because of an exposed frontier and desire for federal military assistance. In Pennsylvania, two large holders of public securities led the opposition to the Constitution.

McDonald's work unseated Beard as the chief interpreter of the Constitution although Jackson Turner Main, *Political Parties Before the Constitution* (1974), maintained, with Beard, that the Federalists were more commercially-oriented and that the Anti-Feder-

Charles A. Beard. *Library of Congress.*

Thus, Beard concluded, the Constitution reflected the spirit of these eighteenth-century conflicts; it was not a set of eternal prescriptions. In the twentieth century, it must become a Constitution based upon twentieth-century relations of production and consumption in a democratic setting.

alists were less so. Main's economic divisions were not precisely the same as those seen by Beard, but Main asserted that there was an economic division corresponding to the political division over ratification.

By the 1980s, Beard's analysis has been supplemented by more sophisticated perspectives, Gordon Wood's chief among them. Wood stated that Beard's notion of the relationship between property and political behavior "was so crude that no further time should be spent on it." Yet, Wood agreed with Beard that "the Constitution was in some sense an aristocratic document designed to curb the democratic excesses of the Revolution." Emphasizing, in *The Creation of The American Republic, 1776-1787* (1969), the importance of revolutionary experience at the local level and also the role of ideas about the nature of government current in the eighteenth century, Wood takes the *rhetoric* of the debate between Federalists and Anti-Federalists seriously. During the war and after, people at large had acted to control prices, prevent profiteering and punish local Tories. In the states, citizens tried to carry out the revolutionary ideal of specifically instructing their legislators. Anti-Federalists believed popular government to be endangered by the new Constitution. The Federalists they claimed, were "aristocratic." The Federalists did believe, says Wood, in "the right of a natural aristocracy to speak for the people." They pictured themselves as "worthy" members of society, "the better sort of people," and the Anti-Federalists as "licentious" and "void of reputation and character." This rhetoric, Wood argues, is *not* as Beard suggested a reflection of "class warfare." It is, rather, a question of "opposing ideologies rooted in different social circumstances." The Federalists, according to this line of reasoning, saw the Constitution as a bulwark against the popular energy released by the revolutionary experience. Beard's economic interpretation has been replaced by Wood's complex social interpretation stressing the role of ideas and social conflict rather than simple material interests.

Still, Beard's work deserves our respect. He was on a meaningful and important trail. He understood that ideas alone do not explain politics and public policy. In 1935, The Macmillan Company, his publisher, re-issued *An Economic Interpretation*, and Beard provided a new introduction in which he admitted to having been influenced in 1913, by "the spirit of the times" and to having been eager to rescue discussion of the Constitution from the mire of "abstract discussions of states' rights and national sovereignty and ... formal, logical, and discriminative analyses of judges' opinions." As always, Beard firmly denied that his was a Marxian view of the Constitution. For one thing, although he admired Marx, Beard was always a relativist who believed that there were no "laws" of history. His writings as a whole do not have theoretical coherence; sometimes ideas are important and sometimes material considerations predominate in his explanations of events. For another, Beard was fond of pointing out that James Madison himself, in *The Federalist* No. 10, saw political factions emerging from conflicting economic interests. "I have never," Beard wrote in 1935, replying to those who labeled him an economic determinist, "believed that 'all history' can or must be 'explained' in economic terms, or any other terms. He who really 'explains' history must have the attributes ascribed by the theologians to God." Yet, Beard added, it did seem to him that "in the great transformations in society, such as was brought about by the formation and adoption of the Constitution, economic 'forces' are primordial or fundamental, and come nearer 'explaining' events than any other 'forces'."

To eliminate or omit economic aspects from history or from discussion of public policy meant, Beard argued, a substitution of mythology for reality and a confusion of issues instead of a clarification of them. The founding fathers were great statesmen because they understood how to use the formalities of the law to protect their interests. "It is for us," Beard urged, "recipients of their heritage, to inquire constantly and persistently, when theories of national power or states' rights are propounded: 'What interests are behind them and to whose advantage will changes or the maintenance of old forms accrue?' By refusing to do this we become victims of history—clay in the hands of its makers."

Suggested additional reading:

Forrest McDonald, *We the People* (1958).

Jackson T. Main, *Political Parties Before the Constitution* (1974).

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969).

Max Farrand, *The Framing of the Constitution of the United States* (1913).

Ellen Nore, *Charles A. Beard: An Intellectual Biography* (1983).

John Patrick Diggins, "Power and Authority in American History: The Case of Charles A. Beard and His Critics," *American Historical Review*, 86 (1981), 701-730.

Ellen Nore is assistant professor of History at Saint Vincent College in Latrobe, Pennsylvania. She is the author of *Charles A. Beard: An Intellectual Biography*. In 1983, she was a Senior Fulbright Lecturer in Colombia and is now working on an intellectual biography of Camillo Torres Restrepo.

For the Classroom

The Meaning of the Constitution: A Syllabus

LIBERTY
CONSTITUTION & LAWS

by WALTER F. MURPHY

This syllabus has been designed under the auspices of Project '87 to provide a common group of readings for a series of five discussion seminars to be organized by libraries or community groups for the Bicentennial of the Constitution. These seminars are intended to help participants obtain a deeper understanding of the issues surrounding constitutional interpretation. Walter F. Murphy is McCormick Professor of Juris Prudence, Department of Politics, Princeton University.

The Nature of the Enterprise

Article VI of the American constitutional document says:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

Like every other form of law, the Constitution needs to be interpreted. It speaks in "majestic generalities" as well as in very specific terms. One might be able to apply mechanically such clauses as that requiring a president to be at least 35 years old, but other sections enumerate such broad powers as that of the president to be "commander in Chief of the Army and Navy" or to "take Care that the Laws be faithfully executed." The rights of individuals include "the equal protection of the laws" by state governments, "free exercise of religion," and defense against "unreasonable searches and seizures." The Ninth Amendment's broad proclamation of rights:

> *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*

provides an almost perfect counterweight to the sweeping delegation of power to Congress in Article I:

> *The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing [list of specific] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

This "necessary and proper" clause as well as the national supremacy clause of Article VI are to some extent paralleled by the Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

Thus what "the law" is of the Constitution is sometimes difficult to discover and the field of constitutional law or constitutional interpretation is complex. It is also fascinating as well as critical to our lives. Our rights to travel, to have a family, to enjoy privacy, to vote, to go to public or private schools, to enjoy a presumption of innocence if accused of crime, indeed our very rights to American citizenship itself depend on constitutional interpretation, for the document itself says either nothing at all or very little about these and dozens of other issues at the core of our system of values.

Source books that the syllabus will cite by short title:

Alpheus Thomas Mason & Gordon E. Baker, *Free Government in the Making* (4th ed.; New York: Oxford University Press, 1985) cited as *Free Government*

Walter F. Murphy, James E. Fleming, & William F. Harris, II, *American Constitutional Interpretation* (Mineola, N.Y: Foundation Press, 1986), cited as ACI

There are other casebooks that contain many if not all of the materials listed in the syllabus. Among them are:

Gerald Gunther, *Constitutional Law* (11th ed.; Mineola, N.Y: Foundation Press, 1985)

Alpheus Thomas Mason, William M. Beaney, and D. Grier Stephenson, *American Constitutional Law* (7th ed.; Englewood Cliffs, N.J.: Prentice Hall, 1983)

Working Sessions

1. The Historical Background

Whether we are bound by what the framers and ratifiers of the constitutional document of 1787 and its later amendments had in their minds is a heatedly disputed question. But whatever the legal status of their specific intentions, the founding generation's general purposes to construct a strong yet limited government based on consent—at least the consent of white males—continues to shape not only the American Constitution but the nation's more general ethos as well. The Constitution may now be ours, but the framers' wisdom can never be irrelevant to our lives.

Readings

James Madison, "Vices of the Political System of the United States," reprinted in *Free Government*, pp. 158–160
Irving Dilliard, "Dateline Philadelphia, 1787," from Michael N. Danielson & Walter F. Murphy, eds., *Modern American Democracy* (New York: Holt, Rinehart & Winston, 1969), pp. 8–29
The Anti-Federalists' Objections: Writings by Richard Henry Lee, George Mason, & Robert Yates, reprinted in *Free Government*, pp. 227ff.
The Federalists' Defense: Hamilton & Madison, reprinted in *Free Government*, pp. 251ff.
Adoption of the Bill of Rights: Jefferson & Madison, reprinted in *Free Government*, pp. 285ff.

2. What is the Constitution?

The question may refer to the nature of the Constitution: Is it a contract among consenting parties and so subject to the rules regarding interpretation of agreements among private citizens? Or is it a charter for government and so subject to very different canons of interpretations? Or is it, as Aristotle said, a way of life, and so subject to even broader rules of interpretation?

Second, the question might be asking what the "Constitution" includes—merely the document adopted in 1787 together with its amendments? Or does it also refer to certain understandings at the time of its adoption? And/or certain long established practices (e.g., executive privilege) or even other documents (e.g., the second paragraph of the Declaration of Independence)? Does it also include particular political philosophies and/or economic theories that the terms of the document imply?

The question has yet another dimension: Is the American Constitution an effort to sketch a vision of a good society or is it merely a set of procedures for settling disputes about public issues?

Readings

The Document: Preamble; amendts. 1–10; amendt. 14, §1
Calder v. *Bull* (1798), ACI, p. 86
Palko v. *Connecticut* (1937), CI, p. 94
"A Note on Incorporation," ACI, p. 98
Griswold v. *Connecticut* (1965), ACI, p. 113
Missouri v. *Holland* (1921), ACI, p. 132
William H. Rehnquist, "The Notion of a Living Constitution," ACI, p. 163
Ronald Dworkin, "Taking Rights Seriously," ACI, p. 168

3. Who Has Authority to Interpret the Constitution?

Most Americans who have thought about constitutional interpretation probably think of it as a judicial function. To what extent is that association justified by: The constitutional document? The historical practices of the American republic? The demands of the political theories of democracy and of constitutionalism that underpin the political system? Necessity?

Under what circumstances should one branch of the federal government defer to the constitutional interpretation of another branch? How much deference should one branch give to another's constitutional interpretations?

Readings

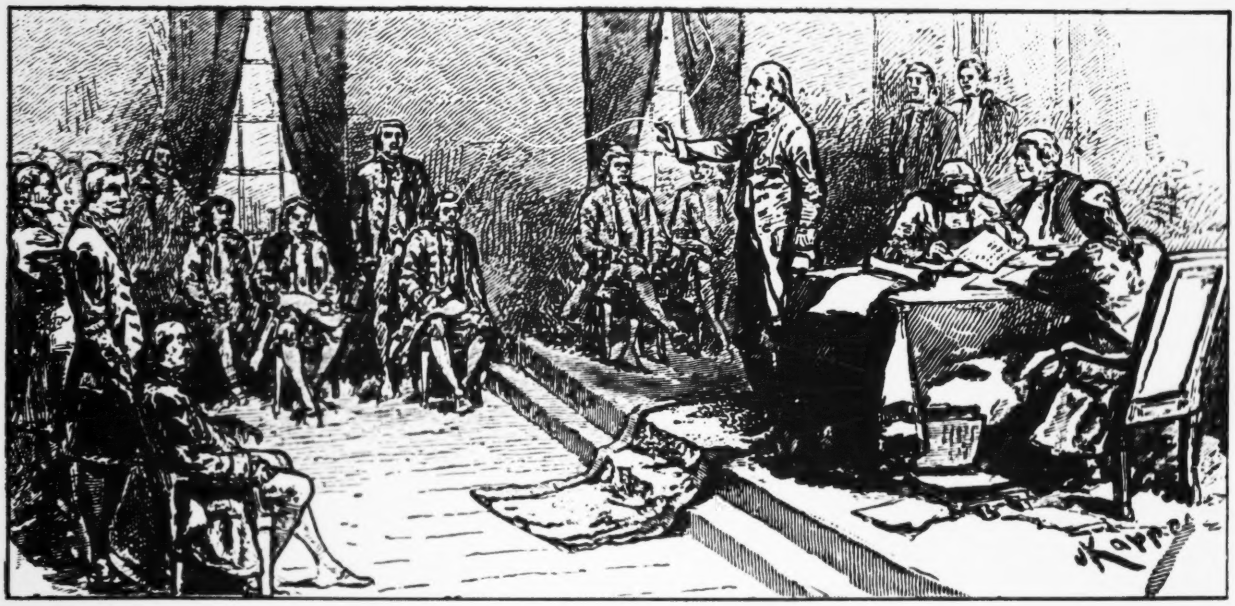
The Document: Arts. I, §8; II, §3; III, §2; & VI, §2
Hamilton, *Federalist* #78, ACI, p. 195
Madison on Judicial Review & Judicial Supremacy, ACI, p. 198
The Great Debate of 1802–1803, ACI, p. 202
  The Senate Debates, p. 203
  Marbury v. *Madison* (1803), p. 211
Andrew Jackson's Veto, ACI, p. 225
Abraham Lincoln's first Inaugural, ACI, p. 226
Nixon v. *United States* (1974), ACI, p. 234

4. How to interpret the Constitution?

Structural Analysis and a Democratic System

The American constitutional document is composed of seven articles and twenty-four amendments. (The Twenty-first Amendment repeals the Eighteenth.) Even if one restricts the term "the Constitution" to that document, one cannot intelligently interpret it by treating clauses as if they were isolated instructions. Structural analysis looks to the "architectural scheme" of the Constitution; it views the Constitution as a totality and from that scheme attempts to rank rights, duties, and powers. Only from that whole, structuralists argue, do individual clauses convey their true meaning.

Structural analysis does not have to be limited to the document's text. William F. Harris, II, points out that structural approaches to constitutional interpretation can range from purely textual ("immanent" is the word he uses) to transcendent, which "looks for structures and coherent wholes outside the [written] Constitution which are signalled by the document. The political, not the linguistic, order itself is viewed as an organized text to be interpreted. . . ."
Beyond the transcendent is what Harris calls "ultra-structuralism," which relies on general political theory(ies) not found in the text of the document ["Bonding Word and Polity," American Political Science Review, LXXVI (1982), 34].



This session's readings as well as those of the next are largely examples of the kind of structural analysis that Harris calls "transcendent," even "ultra-structural." They involve judicial perceptions of signals within the document that point to certain general political theories—democracy and/or constitutionalism. The first asserts that "the people" must be self-governing, not necessarily directly through referenda but at least through representatives freely chosen after open debate to serve for limited terms. Constitutionalism adds that all government, even government that perfectly reflects the wishes of "the people," is limited by certain basic rights that individual human beings have because they are human beings and not because any political system recognizes those rights. It is "to secure these rights," as the Declaration of Independence put it, that "governments are instituted among men."

Two of the prerequisites for a representational democracy are freedom of political communication and a broadly based right to vote. To the extent that officials can determine who can debate political issues and just what issues are open or are not open to debate, a people are not selfgoverning, even though they formally elect representatives. Similarly, if government can exclude from the ballot box adult citizens who are of sane mind and not in prison, elections become suspect. Thus, almost all restrictions on political communication seem illegitimate. But are there no limits here? Should a person have a right to urge that citizens assassinate public officials instead of voting them out of office? Or to incite fellow citizens to rid the world of "social undesirables?" Or to publish military secrets in time of war? Or to advocate political objectives in vile and/or insulting language?

Readings

The Document: Preamble, Art. I, §2; Art. II, §1, ¶2; amendts. 14 (§1), 15, 17, 19, 26
United States v. *Carolene Products* (1938), ACI, p. 482
John Hart Ely, *Democracy and Distrust*, chap. 4
Whitney v. *California* (1927), ACI, p. 503
Dennis v. *United States* (1951), ACI, p. 510
Yates v. *United States* (1957), ACI, p. 519
Barenblatt v. *United States* (1959), ACI, p. 525
New York Times v. *Sullivan* (1964), ACI, p. 596
Reynolds v. *Sims* (1964), p. 349

5. How to Interpret The Constitution?

Structural Analysis and the Discovery (Creation?) of Fundamental Rights

If the heart of constitutionalism is protection of the autonomous individual—furtherance of human dignity—constitutional government must respect a zone of privacy around each individual's personality as well as a wide range of individual control over his/her body. But much of what we do in a complex, interdependent, urban society seriously affects the rights of others. How or where does one find limits on individual rights, limits that protect but do not oppress? To what extent should judges defer to the judgment of popularly elected officials in drawing those lines? To what extent should popularly elected officials defer to the wishes of their own constituents here?

Readings

The Document: Preamble; Art. I, §9, cl 2; amendts. 1–9, 13, & 14 §1
Meyer v. *Nebraska* (1923), ACI, p. 1089
Jacobson v. *Massachusetts* (1905), ACI, p. 91
Buck v. *Bell* (1927), ACI, p. 278
Skinner v. *Oklahoma* (1942), ACI, p. 868
Rochin v. *California* (1952), ACI, p. 100
Griswold v. *Connecticut* (1965), ACI, p. 113
Roe v. *Wade* (1973), ACI, p. 1122
Bell v. *Wolfish* (1979), ACI, p. 1134

Bicentennial Gazette

Bicentennial Presentations

The following list includes recently produced television programs, video cassettes, films, filmstrips, radio programs, audio cassettes, scripts, and other presentations designed for the Bicentennial of the Constitution. For information on additional films and video programs, readers should consult the Educational Film Video Locator *(1986). Lists of related materials can also be obtained from the Commission on the Bicentennial of the United States Constitution, 736 Jackson Pl., Washington, DC 20503, (202) 982-1787, and from* The U.S. Constitution Bicentennial: A WE THE PEOPLE Resource Book, *published by the American Bar Association and the American Library Association, and available from the ABA, 750 N. Lake Shore Dr., Chicago, IL 60611 for $8.50 (which includes three posters).*

Scripts

AFTER THE REVOLUTION, a play about ratification in New Hampshire. Contact David J. Magidson, New Hampshire Commission on the Bicentennial of the United States Constitution, Middletown Road, Wolfeboro, NH 03894.

ALEXANDER HAMILTON, a three-act play about the political rivalry between Hamilton and Aaron Burr. Contact Daniel Fernandez, 601 W. 176th St., NY, NY 10033.

THE CONSTITUTION. 110 scripts with corresponding quizzes. Contact Rory Benson, National Association of Broadcasters, 1771 N Street, N.W., Washington, DC 20036; (202) 429-5446.

THE CONSTITUTION: LITTLE SHORT OF A MIRACLE, one-act drama for middle and high schools by George T. Blume, which takes place on September 17, 1787. Contact the American Legion, P.O. Box 1055, Indianapolis, IN 46206.

THE CONSTITUTION OF THE UNITED STATES, script, props and activities for elementary school children written and illustrated by Janice Howes. A 35-page story book is also available. $8.50 each. Teachers Publishing House, P.O. Box 9358, Canton, Ohio 44711-9358.

THE CONSTITUTIONAL DIALOGUES, three dialogues among members of the founding generation about constitutional issues, by Ferdinand Alexi Hilenski, Academic Development Office, SDEV-106, Fayetteville, Arkansas 72701; (501) 575-4653.

DECISION AT RICHMOND: JUNE 1788, a three-act play on the ratification battle in Virginia, by Robert O. Byrd, 34 Oxford Street, Richmond Hill, Ontario, CANADA L4C 4L5. World Without War Publications, 421 S. Wabash, Chicago, IL 60605; (312) 663-4250.

FATHER ANONYMOUS, a three-act play based in Massachusetts from the Boston Massacre until the ratification of the Constitution. Contact Robert Blecker, 15 Bayberry Ridge, Roslyn, NY 11576.

MERCY, a one-act play reenacting the life of Mercy Otis Warren (1782–1814), by Francine Ringold, 3215 S. Yorktown, Tulsa, OK 74105.

A MORE PERFECT UNION, a play about the Annapolis Convention by William K. Paynter, for adult audiences. Contact Greg Stiverson, Maryland Office for the Bicentennial of the U.S. Constitution, Maryland State Archives, Box 828, Annapolis, MD 21404; (301) 269-3916.

NOAH WEBSTER'S WORDS WITH MUSIC, one-hour musical play about Noah Webster and the ratification, by Wade Barnes, 3A-20 Beekman Place, New York, NY 10022; (212) 840-1234.

PATRIOTS AND THIEVES: A MUSICAL TALE OF 1787, by Ken Stone and Jan Powell, for ages 12+. Contact Ken Stone, 513 South Pacific Avenue, #2, Glendale, CA 91204; (818) 956-5105.

THE SUN IS RISING; THE EAGLE SOARS; 1787, a multimedia docudrama set in 1787 as the founders create the Constitution. Contact John A. Wiegand, 3455 Doris Road, Cleveland, OH 44111.

THE UNITED STATES CONSTITUTION: A NON-TRIVIAL PURSUIT, 52 two-minute radio scripts telling the story of the Constitutional Convention, by Walter Mead, 1279 Grizzly Peak Blvd., Berkeley, CA 94708; (415) 549-1386.

WE ALL ARE A PART OF IT: USA 1776–1840, by Jean Lutterman. Musical play for elementary school students. Norwood School, 8821 River Road, Box L, Bethesda, MD 20817; (301) 365-2595.

Touring Plays

FOUR LITTLE PAGES, a play about the founders. Tours the national parks—all ages. Produced by Franklin S. Roberts Associates, Philadelphia, PA. For information, contact Division of Interpretation, Recreation and Visitor Services, National Park Service, 1100 Ohio Drive, S.W., Washington, DC 20242.

THE PUBLIC HAPPINESS: THOMAS JEFFERSON'S CRUSADE AGAINST IGNORANCE. Contact Warren Kliewer, Artistic Director, East Lynne Company, 281 Lincoln Avenue, Secaucus, NJ 07094; (201) 863-6436.

Slide Shows

THE BLACK AMERICAN AND THE BICENTENNIAL OF THE U.S. CONSTITUTION: A MASS MEDIA PERSPECTIVE, a traveling exhibit consisting of 175 items of print, paintings, documents, posters, postcards, newspapers and magazines from the 1700s to the 1960s, with a slide show lecture. Contact Charles E. Simmons, P.O. Box 2235, Washington, DC 20013-2235; (202) 636-7856.

BLESSINGS OF LIBERTY, 16-minute sound/slide show. Contact the National Audiovisual Center, 8700 Edgewater Drive, Capital Heights, MD 20743-3701; (301) 763-1896.

Films, Filmstrips, Television, Video Cassettes

AN ABRIDGEMENT OF HOPE: THE STORY OF JOHN PUNCH, a documentary about an indentured servant in colonial Virginia, preceded by an introduction dealing with the roots of freedom in the colonial period. Scheduled for September 1987, PBS. Funded by NEH. Produced by Past America, Inc., 12100 NE 16th Avenue, Miami, Florida 33161; (305) 893-1202.

AMERICA: COLONIZATION TO CONSTITUTION, five sound filmstrips for grades 5–12. No. 03719. Other filmstrips available on American government. Contact National Geographic Society, Educational Services, Dept. 87, Washington, DC 20036; (800) 368-2728.

AMERICAN FORUM: MADISON, JEFFERSON AND HAMILTON AND THEIR RELATIONSHIP TO THE CONSTITUTION. Three half-hours. Produced by World News Institute, P.O. Box 484, Great Falls, VA 22066; (703) 759-5808. Also available from the Southeastern Education Committee Association, P.O. Box 5966, 2628 Millwood Ave., Columbia, SC 29250.

THE BLESSINGS OF LIBERTY, ABC News Special on the Philadelphia Convention. Peter Jennings, David Brinkley, and Ted Koppel, hosts. Aired September 16, 1987, 8:00–11:00 p.m. A 16-minute video is available: VHS, 3/4", 16 mm, and dissolved slide show. Cost: $15.45. Contact Mail Order Department, Eastern National Parks and Monuments, 313 Walnut Street, Philadelphia, PA 19106; (800) 821-2903.

A CELEBRATION OF CITIZENSHIP, live broadcast on ABC of events September 16, 1987, at the Capitol, including presentations by President Reagan and retired Chief Justice Warren Burger. Contact Mike Schum, ABC, 1330 Avenue of the Americas, NY, NY 10019; (212) 887-7777.

THE CONSTITUTION, one-minute video/audio spots of comments by spouses of Congress members. Available in limited quantities. Contact Rory Benson, National Association of Broadcasters, 1771 N Street, N.W., Washington, D.C. 20036; (202) 429-5445.

THE CONSTITUTION: A FRAMEWORK TO GOVERN THE NATION. High School students question Washington law professor Edward Bruce about the importance of the Constitution in the 1980s. Originally produced for telecast over C-SPAN. Close Up Foundation. Color. 28 minutes. 1985. Price: $75, BETA videocassette (CU106B-V6); VHS videocassette (CU106V-V6). Social Studies School Service, 10200 Jefferson Blvd., Rm. R-2, P.O. Box 802, Culver City, CA 90232-0802.

THE CONSTITUTION—A LIVING DOCUMENT, a six-part filmstrip which explores the dynamic nature of the Constitution and encourages students to comment on interpretations of its meaning. #07968-920. Price: $189. GA Guidance Associates, Inc., Communications Park, Box 3000, Mount Kisco, NY 10549-9989; (800) 431-1242.

THE CONSTITUTION AT 200: WHY DOES IT STILL WORK? Four parts, Teacher's Guide, Library Kit. #31330-920. The evolution of the Constitution, from the historic political theories on which it is founded, to today's modern interpretations. Price: $179, video or sound filmstrips. GA Guidance Associates, Inc., Communications Park, Box 3000, Mount Kisco, NY 10549-9989, or Sales Department, Prentice Hall Media, Box 1050, Mt. Kisco, NY 10549; (914) 666-4100.

THE CONSTITUTION: FOUNDATION OF OUR GOVERNMENT examines the seven constitutional articles; outlines the principles of republicanism, federalism, separation of powers, and checks and balances; and explains the amendment process, congressional elaboration, and judicial review. Includes three filmstrips with cassettes, a library kit, and a Teacher's Guide. Also filmstrips (GU-6140); or video cassette (GU-6140V). Contact Opportunities for Learning, Inc., 20417 Nordof St., Dept. VR, Chatsworth, CA 91311.

CONSTITUTION MINUTES, 26 one-minute spots on the Constitution. Remarks by historians, actors and dignitaries. Available in VHS, 3/4" and 1" Master. Cost depends on outlet. Contact Lou Reda Productions, Box 68, 44 North Second Street, Easton, PA 18042; (215) 258-2957.

CONSTITUTION OF THE UNITED STATES, a 19-minute look at the Constitutional Convention as seen through the eyes of James Madison. Available in VHS. Cost: $440. Contact Yvonne Dye, Encyclopaedia Britannica Education Corp., 425 N. Michigan Avenue, Chicago, IL 60611; (312) 321-6800.

THE CONSTITUTION PROJECT, a non-profit educational corporation, is developing a seven-part series for public television. The first two programs are *The Ghosts of '87* and *The Road to Runnymede*. Additional programs will address freedom of speech and religion, minority rights and criminal justice. Contact Matthew E. Simek, 1126 S.W. 13th Avenue, Portland, OR 67205; (202) 285-7135.

THE CONSTITUTION: THAT DELICATE BALANCE. Thirteen-part series (one hour each) presented by the Public Broadcasting Service and produced by Columbia University Seminars on Media and Society. Judges, scholars, lawyers, public officials, and journalists discuss constitutional issues. First aired in January 1983. Scheduled for rebroadcast beginning in September 1987. For rental of cassette and preview information, write to the Annenberg/CPB Collection, 1231 Wilmette Avenue, Wilmette, IL 60091, or call 1-800-LEARNER.

THE CONSTITUTION: WE LIVE IT EVERY DAY, an hour-long program hosted by David Hartman on ABC, aired September 8, 1987, at 10 p.m. Four stories about personal freedom. Contact Mike Schum, ABC, 1330 Avenue of the Americas, NY, NY 10019; (212) 887-7777.

CONSTITUTIONAL LAW IN ACTION. NYT851C-V6. Four filmstrips (*Search and Seizure, Due Process, Right to Counsel,* and *State Action*) dramatize actual cases, involving rights granted by the Constitution. The class is invited to interpret the case before hearing the actual Supreme Court verdict. Price: $95, 4 color filmstrips, 4 cassettes, guide. Social Studies School Service, 10200 Jefferson Blvd., Room R-2, P.O.Box 802, Culver City, CA 90232-0802.

A DESIGN FOR LIBERTY: THE AMERICAN CONSTITUTION, a 28-minute program on liberty from the American Revolution to the Constitution. Available in VHS, 3/4", 16 mm. Free on loan. Contact Modern Talking Pictures, 5000 Park Street North, St. Petersburg, FL 33709; (813) 541-5763.

JOHN DICKINSON, 60-minute film produced by the Delaware Heritage Commission, Carvel State Office Building, 820 N. French Street, Wilmington, DE 19801.

ECHOES OF FREEDOM, a 30-second public service television announcement recorded in January 1987 at Independence Hall by the Army Reserve program. Contact Office Chief, Army Reserve, Attn: DAAR-PA, Room 434, 2461 Eisenhower Avenue, Alexandria, VA 22331; (703) 325-8480.

EDMUND ROSS. Black-and-white. The Kansas senator blocks the impeachment of Andrew Johnson, basing his vote on the trial evidence rather than the dictates of his party's leaders. Part of the television series, **Profiles in Courage**. 50 minutes. Prices: $85, BETA videocassette (ZF106B-V6); $85, VHS videocassette (ZF106V-V6); $95, 3/4" videocassette (ZF106X-V6). Social Studies School Service, 10200 Jefferson Blvd., Room R-2, P.O.Box 802, Culver City, CA 90232-0802.

THE 1879 TRIAL OF PONCA CHIEF STANDING BEAR, a 90-minute docudrama of the 1879 legal case which established that native Americans were recognized under the Constitution. Scheduled October 1987; PBS. Cassette available March 1988. VHS, BETA. Nonbroadcast use only. Cost: $50. Viewer Guide $3.00. Contact Mary Schutz, Nebraska ETV Network, P.O. Box 83111, Lincoln, NE 68501; (402) 472-3611.

EQUAL JUSTICE UNDER THE LAW, six half-hour dramas that cover the career of the first Supreme Court Chief Justice, John Marshall, through his most important decisions (i.e., *Marbury* v. *Madison*, *Gibbons* v. *Ogden*, *McCulloch* v. *Maryland*, and the trial of Aaron Burr). Produced by WQED Pittsburgh and the Judicial Conference of the United States. Repackaging will include narratives delivered by notable figures such as retired Chief Justice Burger. Scheduled for fall 1987. Cassettes available from Social Studies School Service, 10200 Jefferson Blvd., Room R-2, P.O. Box 802, Culver City, CA 90232-0802. Price: $535, 4 BETA videocassettes, guide (NAC110B-V6); or 4 VHS videocassettes, teacher's guide (NAC110V-V6).

THE FIFTH AMENDMENT. SED107C-V6. The evolution and application of the controversial protection against self-incrimination, discussing the impact of the McCarthy hearings in the 1950s and the Miranda decision. Price: $89, 2 color filmstrips, 2 cassettes, 8 reproducible pages, guide. Social Studies School Service, 10200 Jefferson Blvd., Room B-2, P.O. Box 802, Culver City, CA 90232-0802.

THE FIRST AMENDMENT: THAT RADICAL DOCUMENT. Three or four programs examining the First amendment from the perspective of current issues. Produced by WHYY-Philadelphia. Scheduled for January 1988. Contact Susan Hanson, WHYY-Philadelphia, 150 North Sixth Street, Philadelphia, PA 19106; (215) 351-1200.

THE FIRST FREEDOM, a documentary examining religious freedom through the Virginia statute that served as the basis for the First Amendment. Contact Karen Thomas, Film America, 1832 Biltmore Street, N.W., Washington, D.C. 20009; (202) 332-5817.

GOVERNMENT AS IT IS: THE EXECUTIVE, LEGISLATIVE AND JUDICIAL BRANCHES. Two versions available on government branches—30-minute tapes and 1-hour tapes on all three branches or individual branches. Available in Beta 1 and 2, VHS, 3/4" and 16 mm. Only to organizations and educational institutions. Not for TV rebroadcast. Prices vary according to version and format. Contact Tammy Arneson, Pyramid Film & Video, Box 1048, Santa Monica, CA 90406; (213) 828-7577.

A GRAND EXPERIMENT: BRINGING THE U.S. CONSTITUTION INTO THE CLASSROOM, two interactive satellite teleconferences for secondary school teachers scheduled for October and November 1987 to discuss teaching resources. Hosted by John A. Moore, Jr. For more information, contact Robert Threlkeld, Distance Learning Center, California State Polytechnic University, 3801 W. Temple Ave., Pomona, CA 91768; (714) 869-2277.

INSIDE THE CONSTITUTION, a year-long weekly series on C-SPAN, January-December 1987, on Saturday at 1:00 a.m. EST and 7:00 p.m. EST. The series includes interviews that examine the historical development of the Constitution.

In addition, C-SPAN will air a variety of special events during 1987, including a conference of the governors of the original 13 states in May in Philadelphia and the Philadelphia celebration on September 17. Inquiries should be addressed to C-SPAN, 444 North Capitol Street, N.W., Suite 412, Washington, D.C. 20001.

INVENTING A NATION, a 20-minute tape from the "America: A Personal History of the United States" series. Available VHS only to organizations and educational institutions. Not for TV rebroadcast. Cost: $250. Contact Time-Life Films, 100 Eisenhower Drive, Paramus, NJ 07652; (201) 843-4595.

KOREMATSU v. UNITED STATES, a 60-minute docudrama, produced by Past America, Inc. The program involves constitutional issues relating to the internment of Japanese-Americans during World War II. Contact Shep Morgan, Past America, Inc., 12100 NE 16th Avenue, Miami, FL 33161; (305) 893-1202.

A LITTLE REBELLION NOW AND THEN: PROLOGUE TO THE CONSTITUTION, a 30-minute program on the years after the Revolution, culminating in Shays' Rebellion and leading to the Constitutional Convention. Available in Beta, VHS, 3/4", 16 mm. Only to organizations and educational institutions. Not for TV rebroadcast. Cost: $50 to rent. $365 for Beta, VHS, 3/4". $540 for 16 mm. Contact Churchill Films, 662 N. Robertson Blvd., Los Angeles, CA 90069; (800) 334-7830 or (213) 657-5110.

MAIN STREET, a series of five youth-oriented programs discussing the Constitution. Produced by NBC and hosted by Bryant Gumble. Contact Beverly Whitner, NBC Washington, 4001 Nebraska Ave., N.W., Washington, D.C. 20016; (202) 885-4000.

THE MAKING OF THE AMERICAN CONSTITUTION, a 44-minute video docudrama on the Convention of 1787. Volume one of three. VHS. Cable networks and educational use. Contact Mark Lipsitz, American Study Center/Radio America, 499 South Capitol St., S.W., Suite 404, Washington, D.C. 20003; (202) 488-7122.

MIRACLE AT PHILADELPHIA, an ABC production of Catherine Drinker Bowen's book. Funded by General Motors. Contact Mike Schum, ABC, 1330 Avenue of the Americas, New York, NY 10019; (212) 887-7777.

A MORE PERFECT UNION: THE CONSTITUTION AT 200, a 22-week television series (April–September 1987) of two-minute vignettes, produced by Cable News Network (CNN). Daily segments run six times a day examining specific sections of the Constitution, Bill of Rights and landmark Supreme Court decisions. In addition to the two-minute vignettes, CNN will produce and air 11 half-hour programs of a similar nature. Contact Cable News Network, 100 International Blvd., Atlanta, GA 30348; (404) 827-1700. Also available as ***A MORE PERFECT UNION,*** a series of eight 40-minute videotapes on the framers, the Constitutional Convention and major Supreme Court decisions. Master index. Contact Britannica Films, 425 N. Michigan Ave., Chicago, IL 60611; (800) 544-9862.

MOYERS: IN SEARCH OF THE CONSTITUTION, a series of ten one-hour conversations between Bill Moyers and philosophers, Supreme Court justices, judges, scholars and historians. Aired April–June 1987. Funded by General Motors; presented by WNET-New York and WTVS-Detroit. Contact WNET-New York, 356 West 58th Street, New York, NY 10019; (212) 560-2000.

MOYERS: REPORT FROM PHILADELPHIA, a series of 90 3-minute historical perspective commentaries by Bill Moyers on the Constitutional Convention, May to September 1987. Contact WNET-New York, 356 West 58th Street, New York, NY 10019; (212) 560-2000.

NEW TESTS OF THE FIRST AMENDMENT. NYT122C-V6. A teacher's guide with discussion questions and a reproducible worksheet are included. New York Times 1980. Price: $28, color filmstrip, cassette, spirit duplicating master, guide. Social Studies School Service, 10200 Jefferson Blvd., Room R-2, P.O-.Box 802, Culver City, CA 90232-0802.

OUR LIVING CONSTITUTION, two sound filmstrips for grades 5–12, 17 minutes each: "The Constitution and the Bill of Rights" and "Amendments 11 through 26." No. 04060. Other filmstrips available on the U.S. government. Contact National Geographic Society, Educational Services, Dept. 87, Washington, DC 20036; (800) 368-2728.

PORTRAIT OF A DAUGHTER, a 30-minute slide show with script on the evolution of documents from the Mayflower compact to the present. Available in slides with script. Cost: $40.00. Contact June Saylor, Daughters of the American Revolution, 1776 D Street, N.W., Washington, D.C.; (202) 978-3372.

PRESIDENTS IN CRISIS, a four-part series. Fall 1988; PBS. Produced by WGBY-TV, Springfield, MA. The first program is entitled, "Lincoln and Fort Sumter." Contact Tula Urdaz, WGBY-TV, 44 Hampden Street, Springfield, MA 01103; (413) 781-2801.

THE PRESIDENCY AND THE CONSTITUTION explores the domestic and foreign issues facing the modern presidency in 8 one-hour programs. Tapes available. Contact Barbara Eddings, Media and Society Seminars, Columbia University School of Journalism, New York, NY 10027; (212) 280-4150.

SEARCHING FOR JUSTICE: THREE AMERICAN STORIES, an examination of three Supreme Court cases, 1 dealing with capital punishment, one with abortion, and one about racial discrimination. Includes commentary by Associate Justice Thurgood Marshall. Carl Rowan, moderator. Aired September 1987. Gannett Broadcasting Group, 1611 W. Peachtree St. N.E., Atlanta, GA 30309; (404) 892-1611.

SIGNERS OF THE CONSTITUTION, a set featuring 39 one-minute spots on the Signers and a 6-minute, 40-second piece on George Washington. Remarks by Secretry of the Army John O. Marsh, Jr. Cassette available in VHS and 3/4". Contact Captain Boggs, U.S. Army, Command Info. Unit, Electronic Media Branch, Building 160/2, 2nd & M Sts., S.E., Washington, D.C. 20315-0300; (202) 433-2404.

SIMPLE JUSTICE: THE STORY OF BROWN v. TOPEKA BOARD OF EDUCATION (1954) SUPREME COURT DECISION, a four-hour mini-series, scheduled to air Spring 1989. Produced by New Images Productions, Inc., 919 Euclid Avenue, Berkeley, California 94708; (415) 548-1790.

SUPREME COURT DECISIONS THAT CHANGED THE NATION: *Marbury* v. *Madison*; *McCulloch* v. *Maryland*; The Dred Scott Decision; *Plessy* v. *Ferguson*; *Brown* v. *Board of Education*; *Gideon* v. *Wainwright* and *Miranda* v. *Arizona*. Each filmstrip is accompanied by a teacher's guide and a library kit. Prices: $59 (filmstrip); $69 (filmstrips-on-video). GA Guidance Associates, Inc., Communications Park, Box 3000 Mt. Kisco, NY 10549-9989; (800) 431-1242.

THIS CONSTITUTION: A HISTORY. Five thirty-minute television programs: the Federal City, South Carolina and the United States, Prayer in the Classroom, the Pursuit of Equality, and the Rise and Fall of Prohibition. Scheduled for fall of 1987. Videocassettes available. Produced by the International University Consortium (IUC) and Maryland Public Television, in cooperation with Project '87. Contact Diane Harrison, Maryland Public TV, Maryland Center for Public Broadcasting, 11767 Bonita Avenue, Owings Mills, MD 21117; (301) 356-5600.

THIS HONORABLE COURT two one-hour programs examining the history and function of the Supreme Court. Produced by WETA; hosted by Paul Duke. Scheduled for spring of 1988. Contact WETA, P. O. Box 2626, Washington, D.C. 20013; (202) 998-2626.

THIS PRECIOUS HERITAGE: CIVIL RIGHTS IN THE UNITED STATES. Anti-Defamation League. AD144C-V6. Price: $30, Color filmstrip, cassette, guide. Social Studies School Service, 10200 Jefferson Blvd., Room R-2, P.O. Box 802, Culver City, CA 90232-0802.

TO FORM A MORE PERFECT UNION, a 31-minute program depicting the Federalists' and Anti-Federalists' struggle in ratifying the Constitution. 16 mm film available at $325.50; videocassette (VHS), item No. 51224 at $69.95. Produced by National Geographic Society, 17th and M Streets, N.W., Washington, D.C. 20036; (800) 368-2728. Contact Marylou Crummitt.

THE U.S. CONSTITUTION, six 30-minute programs, hosted by Bill Moyers, on limited government, federalism, separation of powers, free speech, equal protection, and the economy. Price: $180.00 each. Contact Agency for Instructional Technology, Box A, Bloomington, IN 47402; (800) 457-4509.

THE UNITED STATES CONSTITUTION: A DOCUMENT FOR DEMOCRACY. This video and sound filmstrip production, narrated by newscaster Bill Kurtis, explores the Constitution as a living framework for government and introduces the framers. Available on VHS cassette ($59) and filmstrip ($35). Grades 5–9. For information call (800) 621-1900 or write SVE, 1342 W. Diversey Avenue, Chicago, IL 60614.

THE U.S. CONSTITUTION IN ACTION: CREATING A FEDERAL UNION. Four 15-minute filmstrips. Educational use only. Cost: $193. Contact Random House Inc., Educational Enrichment Materials, Dept. 9261, 400 Haan Road, Westminster, MD 21157; (800) 638-6960.

THE U.S. CONSTITUTION IN ACTION: THE LIVING DOCUMENT. Four 15-minute filmstrips. Educational use only. Cost: $193. Contact Random House Inc., Educational Enrichment Materials, Dept. 9261, 400 Haan Road, Westminster, MD 21157; (800) 638-6960.

THE U.S. CONSTITUTION: ORIGINS IN CLASSICAL GREECE. A 13-minute videotape that discusses the Greek influence on the Philadelphia Convention, the Constitution, and architecture in America. VHS cassette, 16 mm film available. Produced by American Hellenic Alliance, 1700 North Moore Street, Suite 927, Arlington, VA 22209; (703) 525-1717. Contact Barbara Darr.

VISIONS OF THE CONSTITUTION, a series of five programs that examines the Constitution and how it functions.

Produced by WQED and Metropolitan Pittsburgh Public Broadcasting. Hosted by Judy Woodruff and Tom Gerety. Contact Peggy Zapple, WQED, 4802 Fifth Avenue, Pittsburgh, PA 15213; (412) 622-1324.

WE THE PEOPLE, four one-hour public affairs programs, produced by American Bar Association and KQED-TV, San Francisco. Peter Jennings, host. Scheduled for September 1987. Eight 30-minute videocassettes available with study guide. Contact Films for the Humanities, Inc., P.O. Box 2053, Princeton, NJ 08543; (800) 257-5126.

WE THE PEOPLE 200: THE CELEBRATION OF THE BICENTENNIAL OF THE CONSTITUTION OF THE UNITED STATES, live coverage of the events in Philadelphia on September 17, 1987, by CBS, 51 West 52 St., NY, NY 10019; (212) 975-4321.

THE WORK OF PEACE: THE TREATY OF PARIS, 1783, film and curriculum materials pertaining to the Treaty of Paris which ended the American War of Independence. Contact Office of Telecommunications, Natural History Building, Room C22B, Smithsonian Institution, Washington, D.C. 20560; (202) 357-2984.

Programs for Children

MUSICAL SALUTE TO THE CONSTITUTION, a 43-minute musical salute as soon through the eyes of children. Available in VHS or 3/4". Contact Alice Beebe, Young Citizens for America, 310 Constitution Avenue, N.E., Washington, D.C. 20002; (202) 543-9262.

RAINBOW'S END, a half-hour television program for deaf children, 8–12 years of age, is being produced by D.E.A.F. Media, Inc. entitled, "Rules, Laws and the U.S. Constitution." PBS. Contact Susan Rutherford, D.E.A.F. Media, Inc., 2600 Tenth Street, Berkeley, CA 94710; (415) 841-0165.

Radio, Records, Audio Cassettes

BILL OF RIGHTS RADIO EDUCATION PROJECT, a series of 13 half-hour radio documentaries on controversial issues (e.g., the insanity defense, abortion, gun control, sex education, prayer in the public schools). Scheduled for public radio stations, fall 1987. Audio cassettes, $11.00 each. Produced by the American Civil Liberties Union and Pacifica Foundation. For more information, contact Pacifica Radio Archives, 5316 Venice Blvd., Los Angeles, CA 90019; (213) 931-1625.

A CHORAL READING OF OUR ENDURING CONSTITUTION. LP record or cassette. Heritage Enterprises, 325 N. 13th St., Philadelphia, PA 19107-1118; (215) 627-4340.

THE CONSTITUTIONAL CONVENTION, 24 one-minute radio messages recorded by actor Gregory Peck which focus on the delegates and issues of the Constitutional Convention held at Philadelphia in 1787. Produced by the Constitutional Rights Foundation and the Los Angeles County Bar Association. The recorded messages will be distributed free of charge to radio stations nationwide through the cooperation of the National Association of Broadcasters. They will also be made available on cassette and in printed form for distribution to schools in Los Angeles County. Contact Rory Benson, National Association of Broadcasters, 1771 N Street, N.W., Washington, D.C. 20036; (202) 429-5446.

DATELINE 1787, National Radio Theatre of Chicago. 13 half-hour weekly programs. Available free to public radio stations. NRT, 600 N. McClurg Court, suite 502-A, Chicago, IL 60611; (312) 751-1625.

THE DECLARATION OF INDEPENDENCE AND HOW IT CAME ABOUT, first of the Americana series by Words and Music Studio, P.O. Box 156, Newtonville, MA 01260; (617) 244-2044.

THE LIVING CONSTITUTION OF THE UNITED STATES, a recorded reading of the Constitution, with music. Available on LP record or cassette. Contact Project Constitution, P.O. Box 302, Little Falls, NJ 07424.

MR. ADAMS AND MR. JEFFERSON: A DRAMATIZATION FOR THE RADIO, Carleton College, Northfield, MN 55057; (507) 663-4303.

NEWS REPORTS, 88 three-minute programs. America Studies Center, 426 C St., N.E., Washington, DC 20003; (202) 547-9409.

VOICES OF FREEDOM, three-minute segments by Walter Cronkite on tape, reciting passages about the Constitution by George Washington. Produced by People for the American Way, 1424 16th Street, N.W., Washington, D.C. 20036. User's Guide available. Contact Nancy Stella (202) 462-4777.

WE THE PEOPLE, twelve 30 to 60-second audio documentaries on the Constitution, the Soldier Signers, and the role of the Army Reserves in the ratification process. Audio cassette available. Contact Office Chief, Army Reserves, Attention: DAAR-PA, Room 434, 2461 Eisenhower Avenue, Alexandria, VA 22331; (703) 325-8480.

Programs for Children

CHILDREN'S GUIDE TO THE CONSTITUTION, audio tape. Audio cassette available. Contact Mark Lipsitz, American Study Center, 499 South Capitol Street, S.W., Suite 404, Washington, D.C. 20003; (202) 488-7122.

I LOVE AMERICA, audio tape of songs about the Constitution and America by children. Audio cassette available. Contact Alice Beebe, Young Citizens for America, 310 Constitution Ave. N.E., Washington, D.C. 20002; (202) 543-9262.

Thomas Jefferson. *Library of Congress.*

Television-Assisted Course Focuses on Constitutional History

The United States Constitution and its development over its two-hundred-year history is the focus of "This Constitution: A History," a new television-assisted open learning course developed by the International University Consortium at the University of Maryland University College, in association with Project '87 and Maryland Public Television.

"This Constitution: A History" was designed so that it can be used as a self-contained course on the Constitution for adult, part-time students. In addition, individual components can be used to support college classroom instruction in a variety of history and political science courses.

The components include five half-hour television programs that explore the Constitution's role in a variety of social issues (including school prayer, affirmative action, and prohibition), a new Anthology that provides an interdisciplinary approach to understanding the Constitution, and a Course Guide that ties together all components for the adult student.

The package will be used as a course by member institutions of the International University Consortium beginning this fall and will be available for licensing by other colleges and universities throughout the United States. Individual television programs, and the Anthology will be available for use in classrooms and by community groups as part of the bicentennial celebration of the U.S. Constitution.

"This Constitution: A History" was developed through grants from the National Endowment for the Humanities and involved a team of constitutional scholars chaired by Herman Belz of The University of Maryland and including Michal R. Belknap, California Western School of Law; Michael Les Benedict, Ohio State University; Richard C. Cortner, University of Arizona; Thomas E. Cronin, Colorado College; Don E. Fehrenbacher, Huntington Library; Tony Freyer, University of Alabama; Kermit L. Hall, University of Florida; Ralph Lerner, University of Chicago; and Peter Onuf, Southern Methodist University.

For more information on "This Constitution: A History," contact The International University Consortium, The University of Maryland University College, University Blvd. at Adelphi Road, College Park, MD 20742-1612; (301) 985-7811.

Exhibits

"Designing a Nation: Science, Technology & The Constitution" Exhibit Opens

From April 30 to September 30, 1987, the American Philosophical Society, in its first modern exhibition, is displaying books, manuscripts, artifacts and works of art from its collections to tell the story of the federal government's use of science and technology from 1787 to 1830. Catalogue available. Write to the American Philosophical Society Annex, 427 Chestnut St., Philadelphia, PA 19106; or call (215) 627-0706.

Publications

THE UNITED STATES CONSTITUTION: PERSONALITIES, PRINCIPLES, AND ISSUES

A volume by Walter B. Mead, published by the University of South Carolina Press, Columbia, SC 29208; (803) 777-5243. Available in August 1987. $9.95 (pap.); $22.95 (hc).

FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH

Michal R. Belknap examines the federal government's posture toward racial conflict in the South in the 1950s and 1960s. 387 pp. $35.00. University of Georgia Press, Athens, GA 30602; (404) 542-2830.

SCIENCE, TECHNOLOGY AND THE CONSTITUTION

A background paper by the Office of Technology Assessment. 23 pp. $1.50. Available from the Superintendent of Documents, Government Printing Office, Washington, DC 20402-9325; (202) 783-3238.

JAMES MADISON: THE FOUNDING FATHER

A biography of Madison by Robert A. Rutland. 287 pp. $19.95. Macmillan Publishing Co., 1866 Third Ave., NY, NY 10022.

THE FRAMING AND RATIFICATION OF THE CONSTITUTION

Twenty essays edited by Leonard W. Levy and Dennis J. Mahonney. 395 pp. $24.95. Macmillan Publishing Co., 1866 Third Ave., NY NY 10022.

THE CONSTITUTION OF THE UNITED STATES: A GUIDE AND BIBLIOGRAPHY TO CURRENT SCHOLARLY RESEARCH

A selective bibliography of legal writings on the Constitution from 1970 to 1986, arranged by section of the Constitution. Compiled by Bernard D. Reams, Jr., and Stuart D. Yoak. 562 pp. $65.00. Oceana Publications, Inc., Dobbs Ferry, NY 10522.

WE THE PEOPLE: BITS, BYTES AND HIGHLIGHTS OF THE U.S. CONSTITUTION AND THE BILL OF RIGHTS

This 32-page picture book describes the Constitutional Convention for children ages 8 and older through cartoon characters playing a computer game. Written by Heidi Wolf, illustrated by Jerry McDaniel. $4.95 from STORYVIEWS Publishing Co., 136 E. 55 St., NY, NY 10022.

CAPITAL CITY: NEW YORK AFTER THE REVOLUTION

This guide to a special exhibit organized by Fraunces Tavern Museum includes an introductory essay, 40 illustrations, and a bibliography. 52 pp. $7.95. Fraunces Tavern Museum, 54 Pearl Street, NY, NY 10004-2429.

A GRAND EXPERIMENT: THE CONSTITUTION AT 200

Edited by John A. Moore, Jr. and John E. Murphy, this volume includes 8 essays by the participants of the Douglass Adair Symposia: Leonard Levy, Richard B. Morris, Sarah Weddington, Austin Ranney, C. Lani Guinier, William F. Buckley, Jr., Harry V. Jaffa, James MacGregor Burns. Each piece is followed by a commentary. Available for $30 from Scholarly Resources, Inc., 104 Greenhill Ave., Wilmington, DE 19805; (800) 772-8937.

THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE CREATION OF THE FEDERAL CONSTITUTION

Edited by Patrick T. Conley, Esq., this volume contains an essay on each of the original thirteen states, including a bibliography for each. Illustrated and written for the general public, the book also includes an introductory overview. Available in January 1988 from Madison House. Contact Patrick T. Conley, Esq., 189 Wickenden St., Providence, RI 02903; (401) 861-5656.

Scholarly Conferences

HOW DOES THE CONSTITUTION ESTABLISH JUSTICE?

American Enterprise Institute
U.S. Department of Justice
Washington, DC
September 11–12, 1987

Principal speakers: Robert Bork, U.S. Circuit Court of Appeals; Abram Chayes, Harvard Law School; Henry Manne, George Mason Law School; Michael Perry, Northwestern Law School; Walter Berns, Georgetown University; Harry Clor, Kenyon College; Edwin Meese III, U.S. Attorney General; Christopher DeMuth, AEI.
For information, contact Katy Breen, AEI, 1150 17th St. NW, Washington, DC 20036; (202) 862-5885.

LIBERTY AND THE LAW: THE POWER OF THE JUDICIARY IN HISTORICAL PERSPECTIVE

Purdue University/Calumet
Hammond, IN
November 21, 1987

Principal speaker: Robert V. Remini, University of Illinois. For further information, contact Edward P. Keleher, Dept. of History and Political Science, Purdue University Calumet, Hammond, IN 46323.

NEW AMERICANS AND OUR CHANGING CONSTITUTION: DREAM AND REALITY FOR IMMIGRANTS TO AMERICA

William Paterson College of New Jersey
Wayne, NJ
October 23, 1987

Principal speakers: Rudolph J. Vecoli, Univ. Minn.; Steven Golin, Bloomfield Coll.; Henry Bischoff, Ramapo Coll.; Wilson Carey McWilliams, Rutgers Univ.; Leonard Dinnerstein, Univ. Ariz.; Lydio F. Tomasi, Cent. for Migration Studies; Gary E. Rubin, Amer. Jewish C'ttee.
For further information, contact Joseph Brandes, History Department, William Paterson College, Wayne, NJ 07470; (201) 595-3045.

BERKELEY SEMINAR ON FEDERALISM

University of California
Berkeley, CA
October 30–31, 1987

Principal speakers: Daniel Elazar, Temple University; A. E. Dick Howard, University of Virginia Law School; David Rothman, Columbia University; Edward Beiser, Brown University; Eugene Lee, UC Berkeley; Robert Inman, Univ. of Pennsylvania; Daniel Rubinfeld, UC Berkeley; Peter Leslie, Queens University; Richard Buxbaum, UC Berkeley; Kent Newmyer, Univ. of Connecticut; Michael Parrish, UC San Diego; Robert Post, UC Berkeley.
Principal topics: federalism and constitutional law; medical care and the federal system; fiscal federalism in the USA and Canada; federalism and the judicial mind.
For further information, contact Harry N. Scheiber, seminar director, Boalt Law School, University of California, Berkeley, CA; (415) 642-4038.

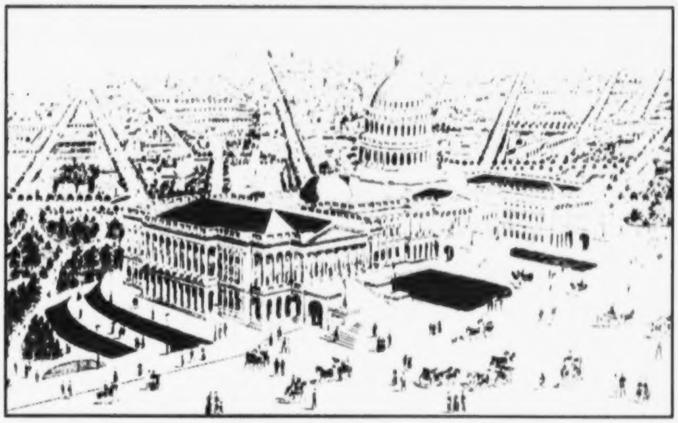
THE U.S. CONSTITUTION: THE FIRST 200 YEARS

Fulbright Colloquium 1987
University House,
University of Birmingham
United Kingdom
September 4–8, 1987
Sponsored by the US-UK Fulbright Commission,
The University of Virginia,
and the British Academy

Principal speakers: Rt. Hon. Lord McCluskey; Cathy Matson, Univ. Tenn.; David Rabban, Univ. Texas; John Zvesper, Univ. E. Anglia; Louis Henkin, Columbia Univ.; A.E. Dick Howard, U.Va.; Gunter Moltmann, Univ. Hamburg; Odile Rudelle, Fond. Nat. Sci. Pol.; J.W. Burrow, Univ. Sussex; A.E. Campbell, Univ. Birm.; Richard Hodder-Williams, Univ. Bristol; James L. Sundquist, Brookings Inst.; Kenneth W. Thompson, U.Va.; Hon. Arthur J. Goldberg.
Principal topics: fundamental rights; judicial interpretation; constitutional models.
For further information, contact Sarah E. Green, Fulbright Commission, 6 Porter Street, London, England W1M 2HR.

National Endowment for the Humanities Initiative on the Foundations of American Society

Continuing the emphasis that began with the initiative on the Bicentennial of the U.S. Constitution, the National Endowment for the Humanities has announced a new special initiative on the foundations of American society. The Endowment welcomes proposals involving studies by scholars or dissemination of scholarship over the whole range of philosophical, historical, and cultural questions raised by the early founding period. Six "topics of special interest" include: history of the founding period; the character of constitutional democracy; cultural life in the new nation; ideas of representation and institutional arrangements; constitutional principles; the Bill of Rights. Applications will be considered by the appropriate NEH division or program. For further information, call or write: Office of Publications and Public Affairs, NEH, Room 409, 1100 Pennsylvania Ave. NW, Washington, DC 20506; (202) 786-0438.



Subscription Information 1987–1988

Subscriptions received by June 1, 1988 will include five issues, beginning with issue no. 14 (Spring, 1987) and ending with issue no. 18 (Spring, 1988). Publication of ***this Constitution*** will conclude with issue no. 18.

Individual copies of issue no. 13 (Winter, 1986) through issue no. 17 (Winter, 1987) can be purchased for $4.00 each. Issue no. 18 (Spring, 1988)— an expanded issue — can be purchased for $6.00. Issue nos. 1–12 are out of print.

Contact Project '87 for information on ordering 10 or more copies of one issue.

Orders must be prepaid; purchase orders cannot be accepted. All orders should be sent and made payable to: Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036, ATTN: Publications.

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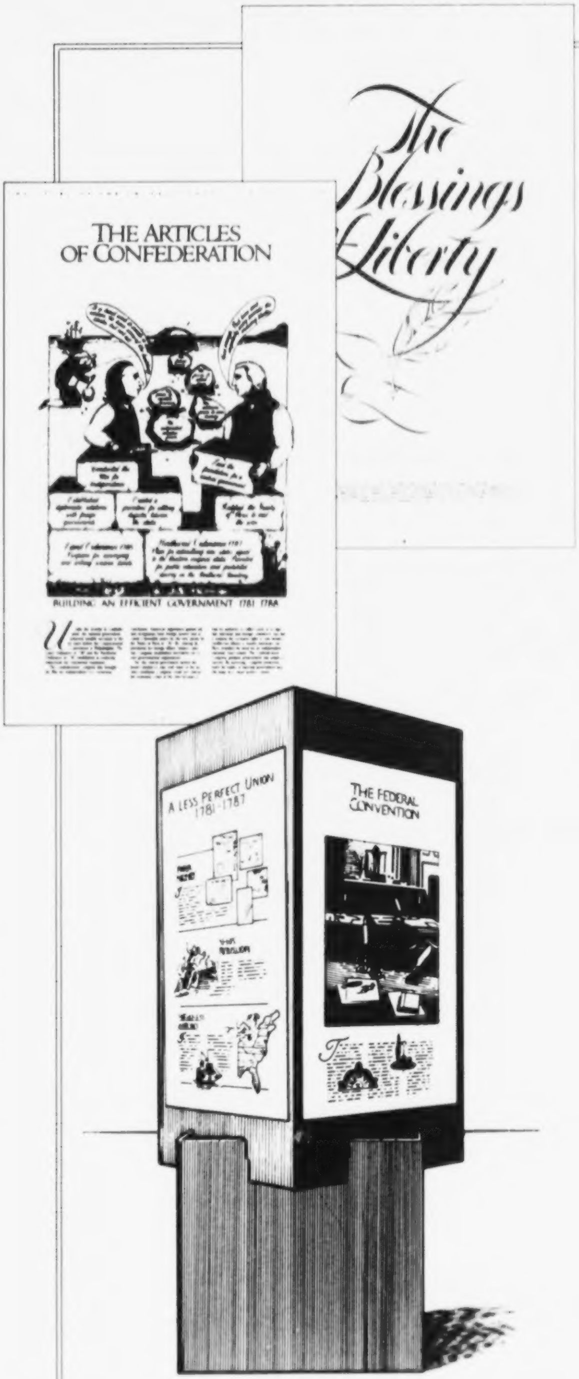
The Blessings of Liberty
THE ARTICLES OF CONFEDERATION
BUILDING AN EFFICIENT GOVERNMENT 1781 1784
A LESS PERFECT UNION 1781-1787
THE FEDERAL CONVENTION

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Ratification
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A City Plan for the Constitution
The Principle of Federalism
The Supreme Law of the Land
To Ourselves and Our Posterity

Chronology of State Constitutions *continued from inside front cover*

PENNSYLVANIA.

MARYLAND.

NEW HAMPSHIRE.

SOUTH CAROLINA

vention which is still in session, completes its work and declares its new constitution in force immediately. Delegates then disband to allow for elections under the new constitution. This is the first constitutional convention to complete a constitution. It is also the first body to write a constitution and then adjourn, rather than continuing in office as the legislature.

September 28, 1776: The *Pennsylvania* constitutional convention finishes its work and declares the new constitution in effect.

October 1776: *Connecticut* declares its colonial charter to be in force, but deletes all references to the King. This document remains the basis of government in Connecticut until 1818.

November 8, 1776: *Maryland* proclaims its constitution to be in force through a special congress elected for the purpose of writing such a document. This congress stays in power as the new legislature of the state.

December 18, 1776: The *North Carolina* constitution is written and put into force by a congress called in the state for that purpose.

February 5, 1777: *Georgia's* constitution, written by the provisional congress, is passed and put into effect.

April 20, 1777: *New York's* provisional congress approves a constitution it wrote. Demands for popular ratification of this constitution are rejected by the congress because New York City and other areas of the state are under British military occupation and ratification by citizens in those areas would be impossible.

June 1777–February 1778: The *Massachusetts* house of representatives writes a constitution for the state.

March 19, 1778: *South Carolina's* general assembly writes a new constitution for the state. This is passed as if it were an ordinary law. South Carolina becomes the first state to *rewrite* its constitution during this period.

March 1778: The *Massachusetts* constitution is submitted to voters in the state. This is the first time that a constitution is submitted to the people for ratification. The constitution is defeated by a vote of 2,083 in favor of ratification and 9,972 against ratification.

September 1, 1779: *Massachusetts* constitutional convention meets in Cambridge. This is the first such convention called by a sitting and legitimately elected legislature, elected by the people, and brought together for the sole purpose of writing a constitution.

March 2, 1780: The *Massachusetts* constitutional convention submits its work to the people of the state for ratification. A two-thirds majority of those voting in town meetings is needed to ratify it.

June 16, 1780: The *Massachusetts* constitution is ratified by the people and goes into effect on October 25.

March 1, 1781: Articles of Confederation, declaring a "perpetual Union between the States," are ratified and go into effect.

June 2, 1784: *New Hampshire* adopts a new constitution which was written by a convention specifically called for that purpose and was ratified by the people through votes at their town meetings.

January 21, 1786: The *Virginia* Assembly proposes a "Joint Meeting of Commissioners from the States to Consider and Recommend a Federal Plan for Regulating Commerce" to take place in Annapolis, Maryland in September.

September 11, 1786: Commissioners from New York, New Jersey, Pennsylvania, Delaware, and Virginia meet in Annapolis, Maryland. The "Annapolis Convention" accomplishes little concerning commercial regulation, but commissioners unanimously recommend that another convention meet in Philadelphia on the "second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Foederal Government adequate to the exigencies of the Union."

May 25, 1787: Delegates from seven states meet in Philadelphia for the first session of the Constitutional Convention. The Convention will meet all summer.

July 13, 1787: The Congress, meeting in New York, passes the Northwest Ordinance, establishing a basis for governing the national territories and creating new states.

September 17, 1787: The Constitutional Convention finishes its work and transmits the new Constitution to the Congress, which sends it to the states for ratification.

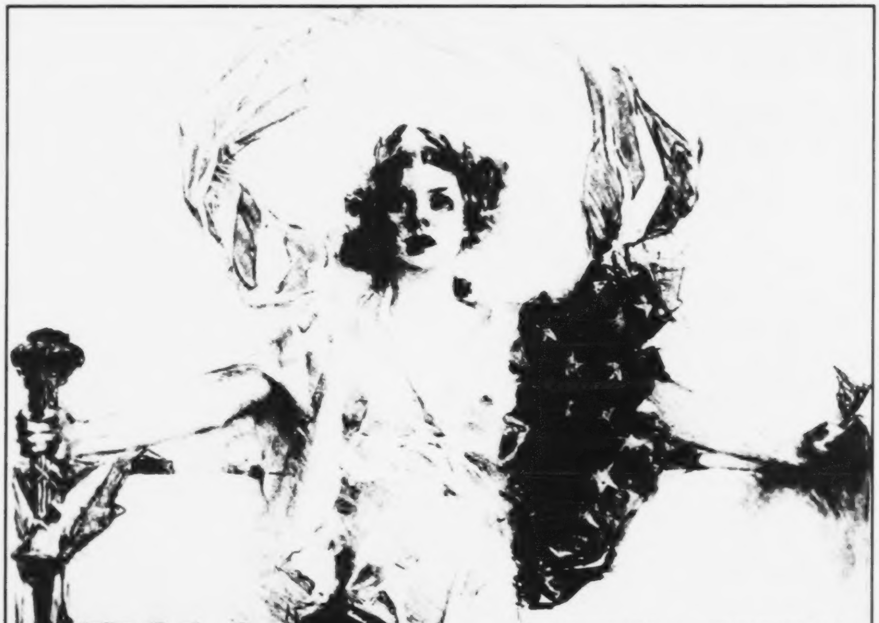
Principal Sources: Charles G. Tansill, ed., *Documents Illustrative of the Formation of the Union of the American States* (1927); Willi Paul Adams, *The First American Constitutions* (1980); Gordon Wood, *The Creation of the American Republic* (1969).

Paul Finkelman is a member of the history department at the State University of New York at Binghamton. He is the author of *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: Univ. of North Carolina Press, 1981), and the editor of *Slavery, Race and the American Legal System, 1700–1872* 16 vols. (New York: Garland Press, 1988).

Received 6/27/88

...do ordain and establish this Constitution for the United States of America.

A Bicentennial Chronicle Spring/Summer 1988, No.18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Project '87

Chronology of Dates from Ratification of the Constitution to Adoption of the Bill of Rights

July 2, 1788: The President of Congress, Cyrus Griffin of Virginia, announces that the Constitution has been ratified by the requisite nine states. A committee is appointed to prepare for the change in government.

July 26, 1788: New York ratifies by vote of 30 to 27 after Alexander Hamilton delays action, hoping that news of ratification from New Hampshire and Virginia would diminish Anti-Federalist sentiment.

August 2, 1788: North Carolina declines to ratify until the addition to the Constitution of a bill of rights.

September 13, 1788: Congress selects New York as the site of the new government and chooses dates for the appointment of and balloting by presidential electors, and for the meeting of the first Congress under the Constitution.

September 30, 1788: Pennsylvania chooses its two senators, Robert Morris and William Maclay, the first state to do so. Elections of senators and representatives continue through August 31, 1790, when Rhode Island concludes its elections.

October 10, 1788: The Congress of the Confederation transacts its last official business.

January 7, 1789: Presidential electors are chosen by ten of the states that have ratified the Constitution (all but New York).

February 4, 1789: Presidential electors vote; George Washington is chosen as president, and John Adams as vice-president.

March 4, 1789: The first Congress convenes in New York, with eight senators and thirteen representatives in attendance, and the remainder en route.

April 1, 1789: The House of Representatives, with 30 of its 59 members present, elects Frederick A. Muhlenberg of Pennsylvania to be its speaker.

April 6, 1789: The Senate, with 9 of 22 senators in attendance, chooses John Langdon of New Hampshire as temporary presiding officer.

April 30, 1789: George Washington is inaugurated as the nation's first president under the Constitution. The oath of office is administered by Robert R. Livingston, chancellor of the State of New York, on the balcony of Federal Hall, at the corner of Wall and Broad Streets in New York City.

July 27, 1789: Congress establishes the Department of Foreign Affairs (later changed to Department of State).

August 7, 1789: Congress establishes the War Department.

September 2, 1789: Congress establishes the Treasury Department.

September 22, 1789: Congress creates the office of Postmaster General.

September 24, 1789: Congress passes the Federal Judiciary Act, which provides for a chief justice and five associate justices of the Supreme Court and which establishes three circuit courts and thirteen district courts. It also creates the office of the Attorney General.

September 25, 1789: Congress submits to the states twelve amendments to the Constitution, in response to the five state ratifying conventions that had emphasized the need for immediate changes.

November 20, 1789: New Jersey ratifies ten of the twelve amendments, the Bill of Rights, the first state to do so.

November 21, 1789: As a result of congressional action to amend the Constitution, North Carolina ratifies the original document, by a vote of 194 to 77.

December 19, 1789: Maryland ratifies the Bill of Rights.

December 22, 1789: North Carolina ratifies the Bill of Rights.

January 25, 1790: New Hampshire ratifies the Bill of Rights.

January 28, 1790: Delaware ratifies the Bill of Rights.

February 24, 1790: New York ratifies the Bill of Rights.

March 10, 1790: Pennsylvania ratifies the Bill of Rights.

May 29, 1790: Rhode Island ratifies the Constitution, by a vote of 34 to 32.

Continued on page 80

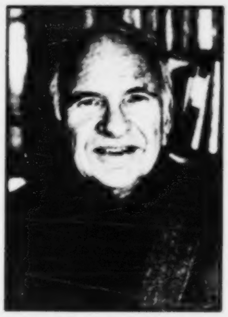
...do ordain and establish

this Constitution

for the United States of America.

A Bicentennial Chronicle

No. 18 **Spring/Summer 1988**



James MacGregor Burns.

Richard B. Morris.

From the Editor

In 1976, the president of the American Political Science Association, James MacGregor Burns, and the president of the American Historical Association, Richard B. Morris, proposed that the two associations undertake a joint effort to prepare for the Bicentennial of the Constitution; Project '87 was the outcome. A unique collaboration, Project '87 has drawn on the expertise of the scholarly community to provide substantive programs and materials to underpin the Bicentennial commemoration. Throughout the twelve-year span of Project '87, Professors Burns and Morris have offered their leadership and inspiration and countless hours of attention and effort. Its success is due to their contribution, as well as to the generosity of the many other scholars who have worked with Project '87 on its programs and materials. Project '87 has also benefited from the support and guidance of the executive directors of the two associations, Samuel Gammon and Thomas E. Mann, who oversaw its operations, and to the judgment and energy of the members of the Joint Committee of scholars that has governed Project '87 over the last decade.

Project '87 began publication of ***this Constitution: A Bicentennial Chronicle*** in 1982, with support for its publication costs provided by the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. A grant from the William and Flora Hewlett Foundation for Project '87's education activities also made an important contribution to the magazine.

The magazine's editorial board, chaired first by Harry Scheiber, University of California at Berkeley, then by Frank Sorauf, University of Minnesota, and finally by Milton Klein, University of Tennessee, has played a seminal role in its development and production. Members included Patricia Bonomi, New York University, Frances K. Burke, Suffolk University, Bonnie Cochran, Bethesda-Chevy Chase (Md.) High School, Milton C. Cummings, Johns Hopkins University, Charles Eldredge, National Museum of American Art, Margaret Horsnell, American International College, James O. Horton, George Washington University, Gary Puckrein, National Museum of American History, Dot Ridings, League of Women Voters, and Richard Wilson, Montgomery County (Md.) Public Schools.

For the magazine's design, the editors are indebted to Charles S. Snyder, who created the original layout and who has prepared every subsequent issue for the press, and to Rebecca Hirsh, who found the photographs that have accompanied the articles. Byrd Press has composed, printed and mailed the magazine beginning with the first issue, maintaining its high quality throughout its publication.

The ultimate contribution came from the authors who responded to Project '87's invitation to share their expertise with a wider national and international audience. Through their efforts, the magazine, like all of Project '87's materials and programs, has rested upon a solid foundation of scholarship, tailored to the specific needs of readers and users in public and educational settings.

this Constitution has provided a link between the scholars of constitutional history, politics and theory and a public audience engaged in thinking about constitutional questions. Although this issue, Spring/Summer 1988, is the final number, many of the articles will continue to be available in a two-volume collection published by Congressional Quarterly, Inc. As at the beginning, we continue to urge our readers to consider these resources for their programs and to sustain for the years to come the thoughtful discussion of constitutional issues that has so far characterized the Bicentennial era.

this Constitution **is published with the assistance of a grant from the National Endowment for the Humanities as part of its special initiative on the Bicentennial of the United States Constitution. Editorial offices are located at 1527 New Hampshire Avenue, N.W., Washington, D.C., 20036. All material in this publication may be photocopied if attributed as follows: "Reprinted from *this Constitution: A Bicentennial Chronicle*, Spring/Summer 1988, published by Project '87 of the American Historical Association and the American Political Science Association." Project '87 would appreciate notification from those who photocopy material in this issue for use in presentations to other groups.** **© Copyright 1988 by the American Historical Association and the American Political Science Association.** **Printed by Byrd Press, Richmond, Va.**

this Constitution

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James Madison and the Bill of Rights

by JACK N. RAKOVE

James Madison went to the Federal Convention of 1787 convinced that it faced no greater challenge than finding some means of checking "the aggressions of interested majorities on the rights of minorities and of individuals." He left it still fearful that the new Constitution would not effectually "secure individuals against encroachments on their rights." In his best known contribution to American political theory, *The Federalist*, No. 10, Madison again voiced his great concern that majorities were enacting laws "adverse to the rights of other citizens," and he went on to define the protection of the individual "faculties" of men as "the first object of government."

These and other statements suggest that Madison should have welcomed the addition of a Bill of Rights to the Constitution. And in fact Madison can rightly be regarded as the principal framer of the Bill of Rights which the First Federal Congress submitted to the states in 1789. Many congressmen felt that he was acting with undue haste in calling for quick action on the subject of amendments. Had Madison not pressed them to consider the amendments he had introduced early in the session, the Bill of Rights might never have been added to the Constitution

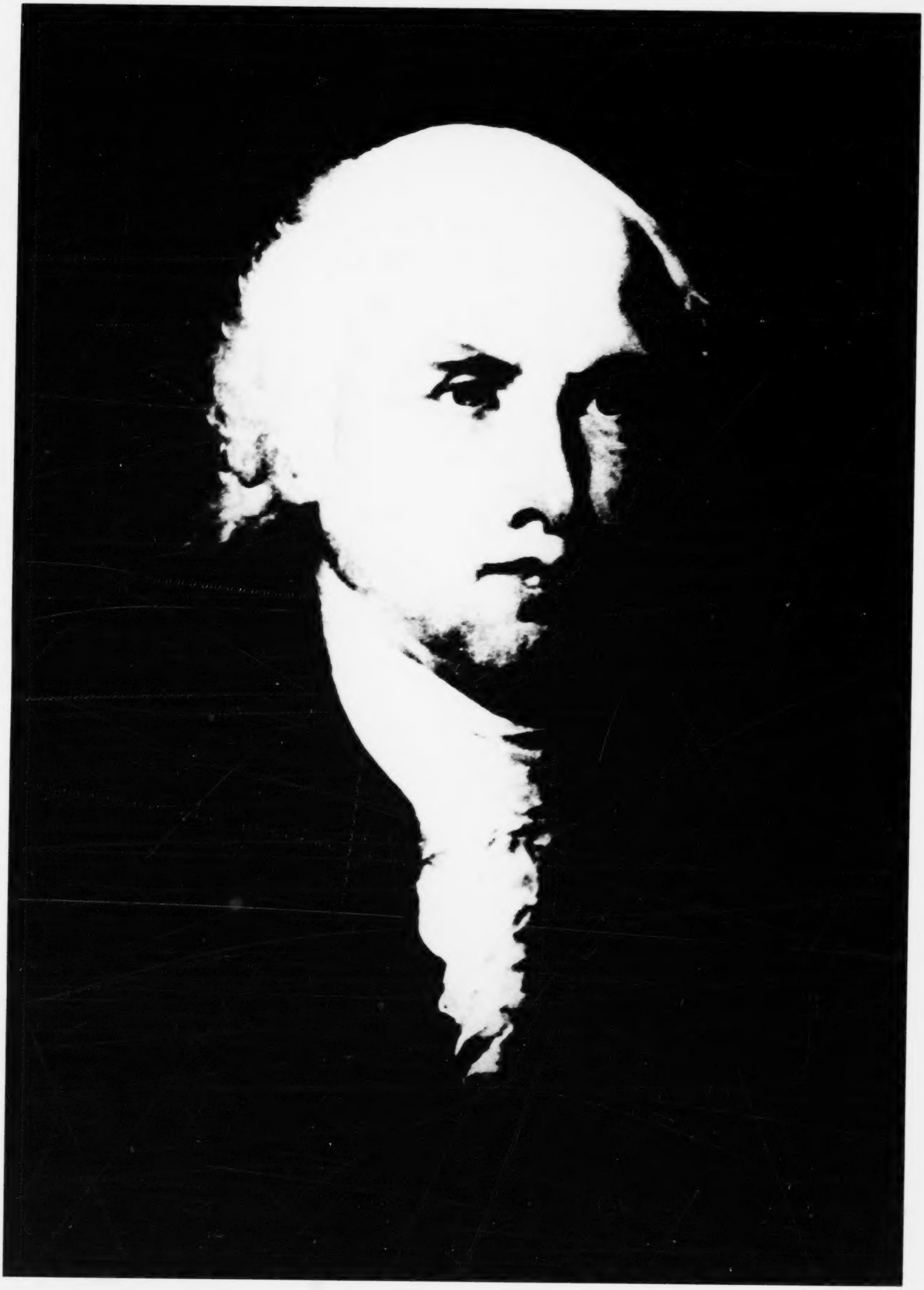
Yet even as he was shepherding the amendments through Congress in August 1789, Madison privately described his efforts as a "nauseous project." His acceptance of the need for a Bill of Rights came grudgingly. When the Constitution was being written in 1787, and even after it was ratified in 1788, Madison dismissed bills of rights as so many "parchment barriers" whose "inefficacy" (he reminded his good friend, Thomas Jefferson) was repeatedly demonstrated "on those occasions when [their] control is most needed." Even after Jefferson's entreaties finally led him to admit that bills of rights might have their uses, it still took a difficult election campaign against another friend, James Monroe, to get Madison to declare that, if elected to the House of Representatives, he would favor adding to the Constitution "the most satisfactory provisions for all essential rights."

To trace the evolution of James Madison's thinking about the virtues and defects of a bill of rights, then, is to confront the ambiguous mix of principled and political concerns that led to the adoption of the first ten amendments. Today, when disputes about the meaning of the Bill of Rights and its lineal descendant, the Fourteenth Amendment, have become so heated—when, indeed, we often regard the Bill of Rights as the essence of the Constitution—it is all the more important to fix the relation between the Constitution of 1787 and the amendments of 1789. To do this there is no better place to begin than with the concerns that troubled James Madison.

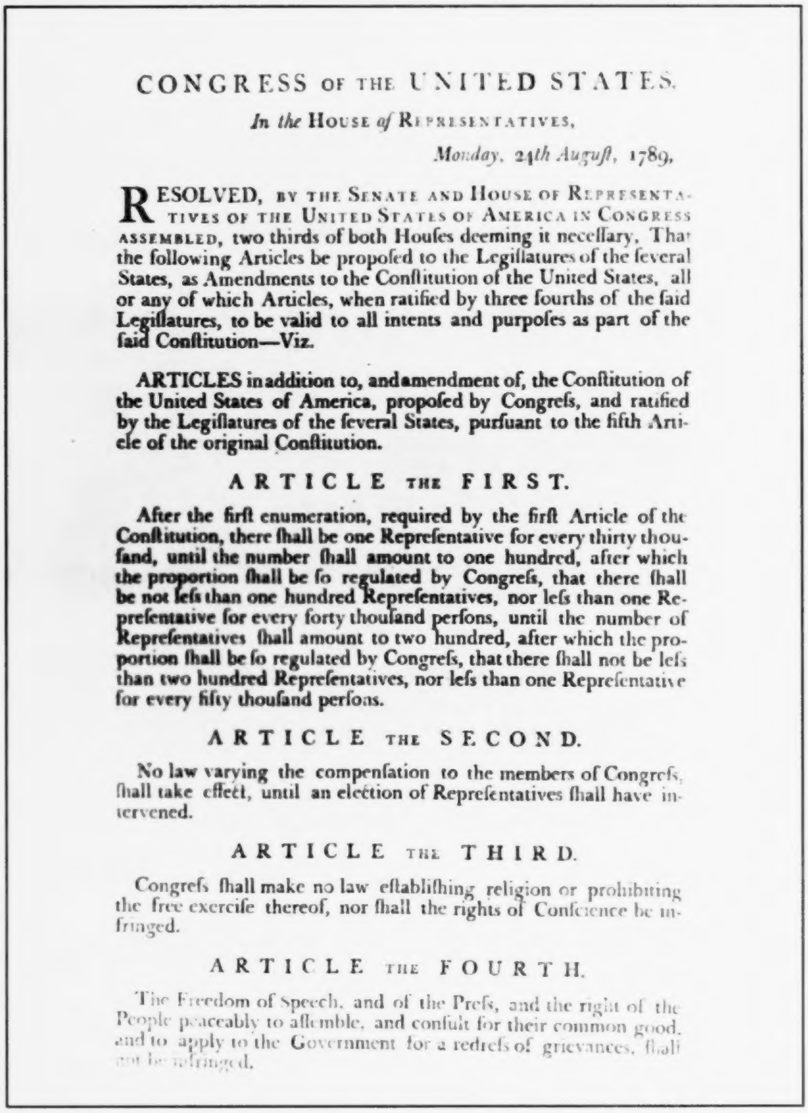
Enumerating Rights

Much of the contemporary debate and controversy about the rights-based decisions that the Supreme Court has made over the past three decades centers on the question of whether the judiciary should protect only those rights that enjoy explicit constitutional or statutory sanction, or whether it can act to establish new rights—as in the case of abortion—on the basis of its understanding of certain general principles of liberty. We cannot know how Madison would decide particular cases today. But one aspect of his analysis of the problem of rights seems highly pertinent to the current debate. Madison's deepest reservations about the wisdom of adopting any bill of rights reflected his awareness of the difficulty of enumerating all the rights that deserved protection against the "infinitude of legislative expedients" that could be deployed to the disadvantage of individuals and minorities. Madison's notion of rights was thus open-ended, but his ideas about which kinds of rights were most vulnerable changed over time. In 1787 he felt that the greatest dangers to liberty concerned the rights of property. The passage of paper money laws in various states revealed the depths of "injustice" to which these populist forces were willing to descend. Worse might be yet to come. At the Federal Convention, Madison told his fellow delegates that he foresaw a day when "power will slide into the hands" of "those who labour under all the hardships of life, and secretly sigh for a more equal distribution of its blessings." And even if the Constitution succeeded in checking the danger from a dispossessed proletariat, Madison thought that almost any act of legislation or taxation would affect rights of property. "What are many of the most important acts of legislation," he asked in *Federalist* 10, "but so many judicial determinations . . . concerning the rights of large bodies of citizens?"

But the development of Madison's ideas of liberty long predated the specific concerns he felt about the economic legislation of the 1780s. His first known comments on political issues of any kind expressed his abhorrence at the persecution of religious dissenters in pre-Revolutionary Virginia; and his first notable action in public life had been to secure an amendment to the Virginia Declaration of Rights, the most influential of the bills of rights that had been attached to the state constitutions



James Madison.



CONGRESS OF THE UNITED STATES.

In the HOUSE *of* REPRESENTATIVES,

Monday, 24th Auguſt, 1789,

RESOLVED, BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, two thirds of both Houſes deeming it neceſſary, That the following Articles be propoſed to the Legiſlatures of the ſeveral States, as Amendments to the Conſtitution of the United States, all or any of which Articles, when ratified by three fourths of the ſaid Legiſlatures, to be valid to all intents and purpoſes as part of the ſaid Conſtitution—Viz.

ARTICLES in addition to, and amendment of, the Conſtitution of the United States of America, propoſed by Congreſs, and ratified by the Legiſlatures of the ſeveral States, purſuant to the fifth Article of the original Conſtitution.

ARTICLE THE FIRST.

After the firſt enumeration, required by the firſt Article of the Conſtitution, there ſhall be one Repreſentative for every thirty thouſand, until the number ſhall amount to one hundred, after which the proportion ſhall be ſo regulated by Congreſs, that there ſhall be not leſs than one hundred Repreſentatives, nor leſs than one Repreſentative for every forty thouſand perſons, until the number of Repreſentatives ſhall amount to two hundred, after which the proportion ſhall be ſo regulated by Congreſs, that there ſhall not be leſs than two hundred Repreſentatives, nor leſs than one Repreſentative for every fifty thouſand perſons.

ARTICLE THE SECOND.

No law varying the compenſation to the members of Congreſs, ſhall take effect, until an election of Repreſentatives ſhall have intervened.

ARTICLE THE THIRD.

Congreſs ſhall make no law eſtabliſhing religion or prohibiting the free exerciſe thereof, nor ſhall the rights of Conſcience be infringed.

ARTICLE THE FOURTH.

The Freedom of Speech, and of the Preſs, and the right of the People peaceably to aſſemble, and conſult for their common good, and to apply to the Government for a redreſs of grievances, ſhall not be infringed.

The first four of twelve amendments to the Constitution proposed by the House of Representatives August 24, 1789. Chapin Library, Williams College, Williamstown, Mass.

written at the time of independence. In 1785 Madison led the fight against a bill to provide public aid for all teachers of the Christian religion in Virginia; the *Memorial and Remonstrance Against Religious Assessments* that he published in conjunction with this campaign treated rights of conscience as a realm of behavior entirely beyond the regulation of civil authority.

Majority Misrule

We thus cannot doubt Madison's commitment to the cause of protecting private rights and civil liberties against improper intrusion by the government. But all orthodox republicans in Revolutionary America shared such beliefs. What carried Madison beyond the conventional thought of his contemporaries was, first, his analysis of the sources of the dangers to individual and minority rights, and second, the solutions and remedies he offered.

Traditional republican theory held that the great danger to liberty lay in the relentless efforts of scheming rulers to aggrandize their power at the expense of ordinary citizens. The great safeguard against such threats was believed to lie in the virtue and vigilance of the people.

The skeptical Madison sought to overturn this received wisdom. In the weeks preceding the gathering of the Federal Convention in May 1787, Madison collected his thoughts in a memorandum on the "Vices of the Political System of the United States." As he saw it, the "multiplicity," "mutability," and most important, "the injustice" of the laws of the states had called "into question the fundamental principle of republican Government, that the majority who rule in such Governments are the safest Guardians both of public Good and of private rights." The experience of the states demonstrated, Madison concluded, that neither legislative majorities nor the popular majorities whom they represented could be expected to refrain "from unjust violations of the rights and interests of the minority, or of individuals," whenever "an apparent interest or common passion" spurred such majorities to act. Religion, honor, a sense of the public good—all the virtues a good republican might hope to see operate as restraints—seemed ineffective.

It is crucial to note that Madison directed his criticism against the character of lawmaking *within the individual states;* and the logic of his analysis further led him to conclude that the greatest dangers to liberty would continue to arise within the states, rather than from a reconstituted national government. The ill effects of majority rule far more likely would emerge within the small compass of local communities or states, where "factious majorities" could easily form, than in the extended sphere of a national republic that would "be broken into a greater variety of interests, of pursuits, of passions," whose very diversity and fluidity would check each other.

A Proposal for a National Veto

The solutions Madison offered to

Madison's deepest reservations about the wisdom of adopting any bill of rights reflected his awareness of the difficulty of enumerating all the rights that deserved protection against the "infinitude of legislative expedients" that could be deployed to the disadvantage of individuals and minorities.

this problem operated at two levels. He reserved his most radical proposal—an absolute national veto over state laws "in all cases whatsoever"—for the continuing need to protect individual rights against majority misrule within the states. In effect, Madison hoped the national government would serve as a "disinterested and dispassionate umpire in disputes between different passions and interests" within the states.

But Madison was also prepared to concede that the wrong kinds of majorities might still coalesce within the new Congress that the Federal Convention would create. "Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex," he reminded the Convention on July 21. Who could say whether Congress might not prove equally "impetuous"? To protect citizens against the danger of unjust *national* legislation, Madison favored establishing a joint executive-judicial council of revision armed with a veto over acts of Congress; he was also attracted to the idea of an independent and powerful Senate, insulated from both the state legislatures and the electorate, to counteract the excesses of the House of Representatives.

Madison justified all of these proposals in terms of the protection they would extend to individual and minority rights. But he went to the Convention convinced that bills of rights could add little if anything to the defense of civil liberty. None of the existing state bills of rights provided an effective check against legislative or popular excess. The problem was that bills of rights were not self-enforcing. The actual protection of the lofty principles they espoused required the existence of well-constituted governments. But if such governments did exist—or could be created—what need would they have for bills of rights?

Most of the framers at Philadelphia agreed that there was no need for adding a bill of rights to the new Constitution, but they rejected Madison's two pet proposals for a national veto and a Council of Revision. The Convention protected individual liberty only by placing a handful of prohibitions on the legislative authority of the states (notably laws impairing the obligation of contracts) or Congress (habeas corpus, ex post facto, bills of attainder). When George Mason belatedly insisted that the new Constitution required a much longer list of enumerated rights, his arguments were ignored.

The rejection of his pet scheme for a national veto on all state laws greatly disappointed Madison. During the first weeks after the Convention's adjournment, he seems to have feared that the new Constitution was fatally flawed because the new government would still lack the authority to deal with the problem of "vicious" popular and legislative majorities in the *states*. Even though the supremacy clause of the Constitution established a basis for state and federal judges to overturn laws violating individual rights, he doubted whether the judiciary could ever muster the will or political strength to withstand majoritarian excesses or the ingenuity of ambitious legislators.

When it came to the dangers that liberty might face from the *national* government, however, he was far more optimistic. Though not entirely happy with the system of checks and balances that would shape relations among the three branches, Madison thought it would discourage the enactment of harmful legislation. Moreover, he continued to rely confidently on the theory of the advantages of multiple factions he had derived just prior to the Convention. "In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces," he wrote in *The Federalist*, No. 51, "a coalition of a majority of the whole society could seldom take place upon any other principles than those of justice and the general good." State laws might still work wholesale injustice; national laws, he believed, would not.

Anti-Federalist Clamor

As Madison threw himself into the campaign to ratify the Constitution, however, he was forced to take seriously the growing clamor for the addition of a bill of rights—especially after Jefferson wrote him to affirm *his* conviction "that a bill of rights is what the people are entitled to against every government on earth, general or particular [i.e., national or local], and what no just government should refuse or rest on inference." Had the issue of amendments been confined to matters of rights alone, Madison might have readily agreed. But fearing that many diehard Anti-Federalists hoped to exploit the call for amendments to propose major changes in the Constitution or even to promote a second convention, Madison balked at accepting Jefferson's correction.

In October 1788—more than a year after the adjournment of the Convention, and a good four months after Virginia became the tenth state to ratify the Constitution—Madison wrote Jefferson to explain why, though now willing to see a bill of rights added to the Constitution, he found no other solid reason to support it than the fact "that it is anxiously desired by others." With other Federalists—notably James Wilson of Pennsylvania—he still thought that a bill of rights was superfluous because the federal government could exercise only those powers that were expressly delegated to it—and those powers did not extend to violating individual liberties. Moreover, Madison confessed his "fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude." Better (in other words) not to have any bill of rights than to incorporate in the Constitution weak statements that might actually leave room for the violation of the very liberties they were meant to protect.

Again, however, Madison drew his greatest doubts about the value of a bill of rights from his analysis of the problem of majority tyranny. In a monarchical regime, Madison noted, such declarations might serve as "a signal for rousing and uniting the superior force of the community" against the government. But in a republic, where the greatest dangers to liberty arose not from government but from the people themselves, a bill of rights could hardly serve to rally the majority against itself. The most Madison would concede was that a bill of rights might help to instill in the people greater respect for "the fundamental maxims of free government," and thus "counteract the impulses of interest and passion." He was willing to entertain, too, the idea that a bill of rights would be useful in case "usurped acts of the government" threatened the liberties of the community— but in his thinking, that problem remained only a speculative possibility.

Like any intellectual, then, Madison valued consistency too highly to renounce ideas to which he was deeply and personally committed.

James Madison, *age 82. Library of Congress.*

But Madison, for all his originality as a political theorist, was also a working politician. His early disappointment with the Constitution had quickly given way to the belief, as he wrote in *The Federalist*, No. 38, that "the errors which may be contained in the Constitution ... [were] such as will not be ascertained until an actual trial shall have pointed them out." Amendments taking the form of a bill of rights might serve a vital *political* function—even though unnecessary on their merits—if they could be framed in such a way as to reconcile the moderate opponents of the Constitution without opening an avenue to a radical assault on the essential structure of the new government.

This sensitivity to the need to assuage popular opinion was reinforced by Madison's own experience in the first congressional elections of 1788–89, when he faced a difficult fight against James Monroe. With reports abroad that Madison "did not think that a single letter of [the Constitution] would admit of a change," he found it necessary not only to return to Virginia from his seat in the Confederation Congress at New York and to travel around the district debating with Monroe, but more important, to issue public letters affirming his willingness to propose and support amendments guaranteeing such "essential rights" as "the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c." Even then, however, he was careful to note that he had "never seen in the Constitution ... those serious dangers which have alarmed many respectable Citizens."

Political Exigencies

Madison carried the election by a margin of 336 votes out of 2,280 cast. Four weeks into the first session of Congress, he informed his colleagues of his intention to bring the subject of amendments forward, but another month passed before he was at last able to present a comprehensive set of proposals on June 8, 1789.

Some congressmen thought that Madison was acting from political motives alone. Senator Robert Morris of Pennsylvania scoffed that Madison "got frightened in Virginia 'and wrote a Book'"—a reference to his public letters on amendments. But there was nothing disingenuous about Madison's June 8 speech introducing his plan of amendments. Having reconciled himself to political exigencies, Madison sought to achieve goals consistent with his private beliefs.

[Madison] proposed adding to the prohibitions on state legislative authority already found in Article VI . . . restraints in the three critical areas of religion, speech, and criminal law . . . . On this proposal, Madison again met defeat."

In typical scholarly fashion, he had culled from over two hundred amendments proposed by the state ratification conventions a list of nineteen potential changes to the Constitution. Two of his proposals concerned congressional salaries and the population ratio of the House; two can best be described as general statements of principles of government. The remaining amendments fell under the general rubric of "rights."

The most noteworthy aspects of Madison's introductory speech of June 8 is that it faithfully recapitulates the positions he had taken not only in his election campaign against Monroe but also in his correspondence with Jefferson. He took care to deal with the objections that could come from Anti-Federalists and Federalists alike, noting his reasons for originally opposing amendments, explaining why he had changed his mind, yet also leaving his listeners and readers with a clear understanding that he was acting on a mixture of political and principled motives. The central elements of his analysis of the problem of protecting rights in a republican government were all there: the difficulty of enumerating rights, the emphasis on the greater danger from popular majorities than acts of government, the risks of trusting too much to "paper barriers."

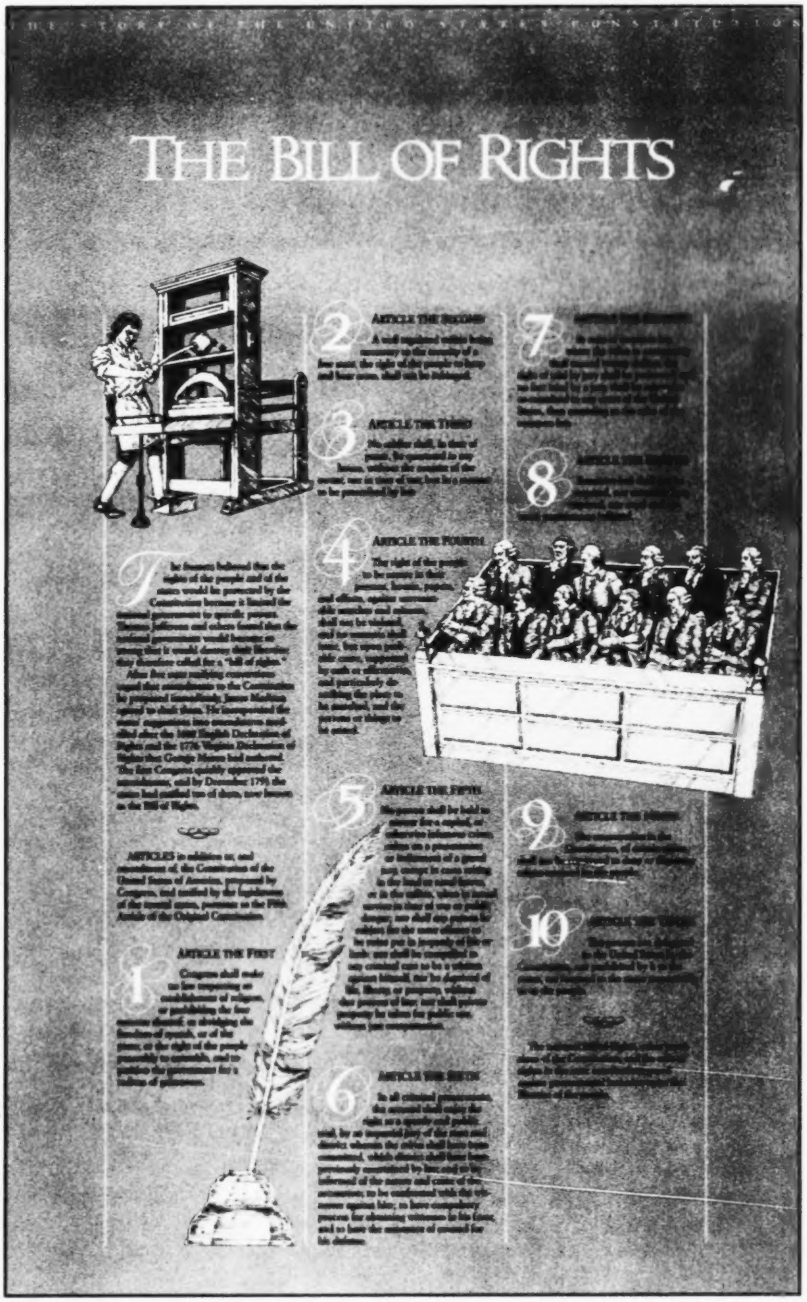
Two of his proposals deserve special notice. The first is the forerunner of the Ninth Amendment. In its graceless original wording, it read: "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution." Here Madison sought to prevent the enumeration of specific rights from relegating other rights to an inferior status—a concern that was consistent with both his open-ended notion of rights and his fear that any textually specific statement might inadvertently or otherwise create loopholes permitting the violation of liberties. As finally adopted by Congress and ratified by the states, this amendment came to read: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Among all the provisions of the Bill of Rights, this somewhat mysterious formula has had perhaps the most curious history. Long ignored and disparaged because it did not identify the additional rights it implied should be protected, it was resurrected in the critical 1965 case of *Griswold* v *Connecticut.* In his concurring opinion, Justice Arthur Goldberg invoked the Ninth Amendment to support the claim that state prohibition on contraception even for married couples violated a fundamental right of privacy that did not need to be specifically identified to be deserving of constitutional protection. If interpreted in Madisonian terms, this "forgotten" provision is immediately and enormously relevant to the current controversy over the extent to which judges can recognize claims of rights not enumerated in the text of the Constitution itself.

"No State Shall Violate . . ."

The second proposal of particular interest—and arguably the most important to Madison—held that "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." All the other amendments that Madison enumerated elsewhere in his speech imposed limitations on the power of the national government alone. This amendment, by contrast, proposed adding to the prohibitions on state legislative authority already found in Article VI of the Constitution these further restraints in the three critical areas of religion, speech, and criminal law. Here, in effect, Madison belatedly hoped to salvage something of his original intention of creating a national government capable of protecting individual rights within (and against) the individual states, in a manner consistent with his belief that the greatest threats to liberty would continue to arise there, and not at the national level of government.

On this proposal Madison again met defeat. Not until the adoption of the Fourteenth Amendment in 1868 would the Constitution contain provisions that would establish a firm foundation upon which the federal government could finally act as the James Madison of 1787–89 had hoped it would. But after a variety of procedural delays, Congress finally endorsed Madison's remaining provisions for the protection of individual liberty. All of the first ten amendments that we collectively describe as the Bill of Rights appeared, in seminal form, in Madison's speech of June 8. Among the rights he then insisted upon recognizing, Madison included: free exercise of religion; freedom of speech, of the press, and the right of assembly; the right to bear arms; and the protection of fundamental civil liberties against the legal and coercive power of the state through such devices as restrictions on "unreasonable searches and seizures," bail, "the right to a speedy and public trial" with "the assistance of counsel," and the right to "just com-



Poster from "The Blessings of Liberty" exhibit, Project '87

pensation" for property.

Rethinking

Because the states retained the major share of legislative responsibility for more than another century, the Bill of Rights had little initial impact. Arguably only during the past forty years has it emerged as a central pillar of American constitutionalism—and thus as a central source of political controversy as well, as the current debate over the legitimacy of judicial "activism" in the enforcement and even creation of rights readily attests. But the question of what the prohibitions of the Bill of Rights finally mean can be answered only in part by appealing to the evidence of history.

Madison himself was one of the first to realize how ideas of rights had to be adjusted to meet changing political circumstances. His original breakthroughs in constitutional theory had rested on the conviction that in a republic the greatest dangers to liberty would arise "not from acts of government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents." He had further predicted that the greatest dangers to liberty would continue to arise within the states. Within a decade of the writing of the Constitution, however, the efforts of the Federalist administration of President John Adams to use the Sedition Act of 1798 to quell the opposition press of Madison's Republican party, in seeming defiance of the First Amendment, forced Madison to rethink his position. Now he saw more clearly how the existence of a bill of rights could serve to rally public opinion against improper acts of government; how dangers to liberty could arise at the enlightened level of national government as well as at the more parochial level of the states; and even how the political influence of the states could be used to check the excesses of national power.

Our ideas of rights and liberty have deep historical and philosophical roots which any good faith effort at interpretation must always take into account; and Madison's agency in drafting both the Constitution and its first ten amendments suggests that his views deserve particular attention and even respect. Yet just as his own efforts to understand both what the Constitution meant and how liberty was to be protected continued well after 1789—indeed literally to his death nearly a half century later—neither can ours be confined to recovering only some one meaning frozen at a mythical moment of supreme understanding. Such a moment has never existed and never will.

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George Mason's "Objections" and the Bill of Rights

by ROBERT A. RUTLAND

In 1787 George Mason was a political figure to be reckoned with, spoken of in the same breath with Virginians Washington, Jefferson, Madison, Patrick Henry, and Richard Henry Lee. He was, as they said then, "a man of parts"; Jefferson described him as "of the first order of greatness." The chief author of the Virginia Declaration of Rights in 1776, Mason had been either a legislator or a confidant in the Revolutionary councils of the Old Dominion from 1774 onward. Now, from May to September in 1787, Mason was a key member of his state's delegation at the Federal Convention, a frequent and persuasive speaker, and the man who played a vital role in such matters as presidential impeachment and fiscal responsibility.

But Mason did not approve of the outcome of the Constitutional Convention. He made significant last-minute motions on the convention floor, and one which his colleagues rejected returned to haunt them: Mason belatedly called for the addition of a bill of rights to the Constitution. Mason's call was shaped into a motion by Elbridge Gerry. They must have witnessed the roll call of states with chagrin as the resolution "to prepare a Bill of Rights" was defeated unanimously.

Then and later the Federalists were short-tempered when the subject of a bill of rights arose. Delegate Robert Sherman was their spokesman when he helped derail Mason's motion. Stating that he too was "for securing the rights of the people where requisite," Sherman continued, that "the State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient." Moreover, Sherman contended, "the Legislature may be safely trusted." James Madison sided with Sherman and five days later, thirty-nine of Mason's colleagues (one by proxy) signed the Constitution. Mason, Gerry, and Edmund Randolph (who also declined to sign), watched the convention approve the Constitution, according to Dr. Franklin's motion, "by the unanimous consent of *the States* present."

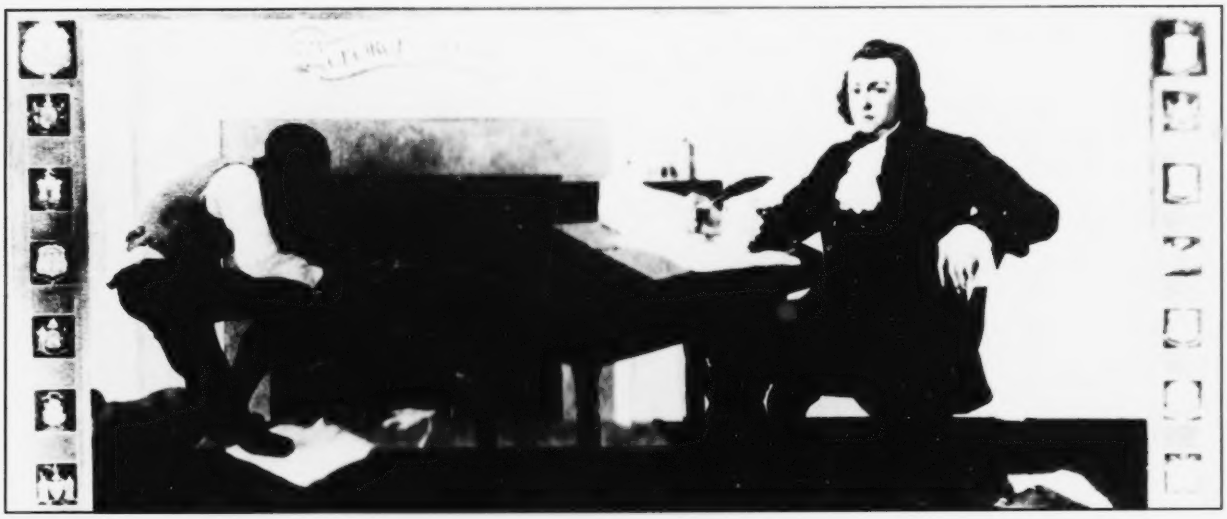
Franklin's tactic placed the trio of naysayers on the defensive, an awkward position for one like Mason who had been so hopeful at the start of the enterprise. Mason had come to Philadelphia that spring convinced that "the Eyes of the United States are turn'd upon this Assembly, & their Expectations raised to a very anxious Degree." "May God grant we may be able to gratify them," Mason prayed in June 1787. Along with James Wilson and James Madison, Mason had engaged articulately in debates on behalf of enlarging participation. Mason's arguments for popular election of the lower house in Congress, his insistence on the right to impeach a corrupt president, and his approval of presidential elections by a direct vote of the citizenry all fitted his philosophical commitment to a broad-based republic. A slaveowner and man of means, Mason had also denounced the slave trade.

At the same time, Mason sought to keep the Union from swallowing the states, and thus he supported selection of senators by the state legislatures and vowed "he never would agree to abolish the State govts. or render them absolutely insignificant." Mason also adamantly sought protection for southern shipping interests in the form of a two-thirds majority for commercial legislation. Within his own guidelines, Mason steadily argued for a government that trusted the people over the privileged. Fellow delegate William Pierce said of Mason: "He is able and convincing in debate, steady and firm in his principles, and undoubtedly one of the best politicians in America."

After nearly four months of give and take, compromise and bullying, the delegates had survived and so had their Constitution; but in Mason's view the convention still gave too little attention given to citizens' rights. Mason distrusted the final draft as a protector of the individual citizen or of the southern planting economy. During that last week, Mason recorded his misgivings about the Constitution on the back of the printed report of the Committee of Style, beginning simply: "There is no Declaration of Rights." From that preamble, Mason proceeded to list what he called his "Objections to this Constitution of Government."

His original list of objections claimed that the Constitution upset the English common law, made Congress into a kind of oligarchy, allowed the federal courts to destroy state ones, and left the presidency rudderless without a "Constitutional Council." Mason feared that without the latter, a natural cabinet "will grow out of the principal officers of the great departments; the worst and most dangerous of all ingredients for such a Council in a free country." The created office of the Vice President, Mason thought, was disastrous and unnecessary, since the incumbent "for want of other employment is made president of the Senate, thereby dangerously blending the executive and legislative powers."

As for the presidential powers, Mason thought the chief executive might misuse his "unrestrained power of granting pardons for treason" and might "screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt." The president's trea-



George Mason. *Library of Congress*

ty-making powers, combined with senatorial approval, made such pacts the supreme law of the land without any scrutiny by the people's branch of government—the House of Representatives. And by allowing a congressional majority to pass laws restricting American commerce "the five Southern States, whose product and circumstances are totally different from that of the eight Northern and Eastern States, may be ruined."

Mason also lambasted the vague construction of the Constitution and foresaw the "general welfare" clause as a catchall term bound to be abused. Although Mason specifically called for declarations of freedom of the press and trial by jury, he lamented the ban on *ex post facto* laws in the state legislatures since "there never was nor can be a legislature but must and will make such laws, when necessity and the public safety require them."

Gloomy to the end, Mason predicted that without an immediate ban on slave trading the nation would be "weaker, more vulnerable, and less capable of defense," and under the Constitution would "set out [as] a moderate aristocracy" then degenerate into either a monarchy or "tyrannical aristocracy." "It will," he predicted, "most probably vibrate some years between the two, and then terminate in the one or the other."

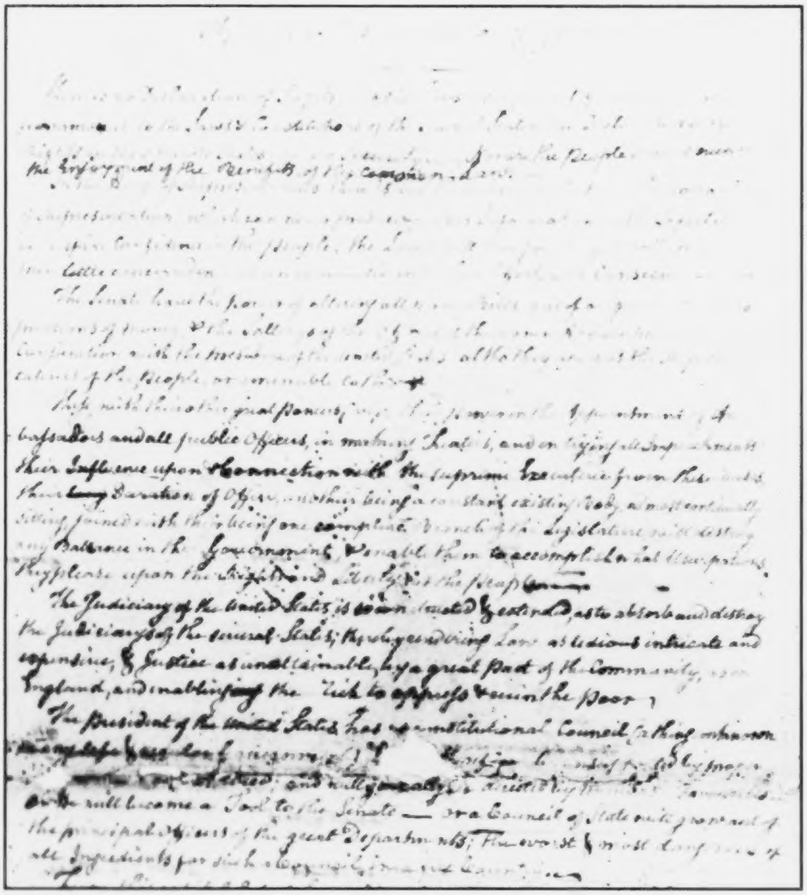
First as a handwritten text and then as a printed pamphlet, Mason's "Objections" made the rounds in Philadelphia's political circles during the last two weeks of September. From the opening phrase of his "Objections" to the bill of rights that James Madison offered in Congress two years later, the line is so direct that we can say Mason forced Madison's hand. Federalist supporters of the Constitution could never overcome the protest created by Mason's phrase: "There is no Declaration of Rights." Months later, Hamilton was still trying "to kill that snake" in *Federalist* No. 84. Oliver Ellsworth's "Landholder" essays in 1787–88, perhaps more influential than the papers of "Publius," also made a frontal attack on Mason's "Objections," as did Federalist James Iredell in North Carolina in 1788.

But the idea was too powerful. Mason's pamphlet soon circulated along the Atlantic seaboard and by the onset of winter the "Objections" had appeared in newspapers in Virginia and New Jersey. Mason himself paid for a second printing and sent Washington the pamphlet early in October, claiming that "a little Moderation & Temper, in the latter End of the Convention, might have removed" his misgivings.

Mason also mailed one to Jefferson, then at his diplomatic post in Paris, explaining that "These Objections of mine were first printed very incorrectly, without my Approbation, or Privity; which laid me under some kind of Necessity of publishing them afterwards, myself. . . . You will find them conceived in general Terms; as I wished to confine them to a narrow Compass." Mason went on to add to his list objections related to regulating the state militia, to the potential power to abuse the election process, and the power of congressmen to raise their own salaries. "But it wou'd be tedious to enumerate all the Objections," Mason concluded, "and I am sure they cannot escape Mr. Jefferson's Observation."

But whatever his other objections, it was the issue of the bill of rights that struck Jefferson. Not long after Mason's pamphlet reached Jefferson's desk in Paris the American minister was writing to friends at home in outspoken terms. Jefferson told Madison he liked the Constitution but was alarmed by "the omission of a bill of rights," and, to John Adams's son-in-law, Jefferson said bluntly: "Were I in America, I would advocate it [the Constitution] warmly till nine states should have adopted, and then as warmly take the other side to convince the remaining four that they ought not to come into it till the declaration of rights is annexed to it."

In a backhanded way, Jefferson's plan became the model. Alarmed by Anti-Federalist strategy that aimed at a second federal convention, friends of the Constitution wanted to derail any scheme for another national gathering. Although Madison was concerned that a bill of rights would offer little real protection and by enumerating some rights put others in jeopardy, if concessions on the bill-of-rights issue could forestall demands for a sec-



"Objections to this Constitution of Government" by George Mason. Library of Congress.

ond convention, Federalists came to realize they must pay that price. Starting at the Massachusetts ratifying convention in February 1788, Federalists in charge of counting votes abandoned their adamant position and began to talk about "recommendatory amendments."

By conceding that a bill of rights ought to be considered by the first Congress, Madison and his coworkers whittled away at the Anti-Federalist majority in Virginia. Their concession on a bill of rights made it easier for committed Anti-Federalist delegates to swallow the bitter pill of ratification, and in Virginia the Federalists' gesture also gave proponents of the Constitution a way to defend a vote in opposition to Patrick Henry and Mason, who were still not assuaged. As they saw their majority melting away, Henry and Mason wanted their proposed amendments, including a bill of rights, to be a condition for Virginia's ratification. When the convention rejected that tactic and voted instead, as the Massachusetts delegates had done, for "recommendatory" amendments, the game for the staunchest Anti-Federalists was over. The Constitution was quickly ratified.

But James Madison had learned his lesson. A few months later, when he ran for a seat in that first Congress, Madison had to assure constituents that "it is my sincere opinion that the Constitution ought to be revised." What changes would he seek? Nothing less than a bill of rights containing "the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c." It seems unlikely that Madison would have made such an about-face without the storm of protest first raised by Mason's "Objections."

By not signing the Constitution, Mason had gained a principle but lost a friend. Or almost so, for a painful estrangement between Madison and himself did not abate until Madison introduced a bill of rights in Congress in September 1789. Mason quickly praised the provisions in a letter to Congressman Samuel Griffin from Virginia, knowing his letter would be seen by Madison. "I have received much Satisfaction from the Amendments to the federal Constitution, which have lately passed the House of Representatives," Mason wrote, "I hope they will also pass the Senate. With two or three further Amendments . . . I cou'd chearfully put my Hand & Heart to the new Government."

One of the most self-effacing men ever to serve the American people, Mason regretted the tensions that grew out of the ratification struggle. Eventually, he welcomed Madison and Jefferson back to his home at Gunston Hall, and their friendship fell into the old grooves. But Mason's standing as a "founding father" was long under a cloud, owing chiefly to his stance on the Constitution. His patriotic service in preparing the Fairfax Resolves in 1774, his cardinal role at the Virginia Convention of 1776, his authorship of that state bill of rights, until 1829), and his offering of time, talent, and money to the American cause between 1776 and 1781 became only dim memories, hardly mentioned in the standard histories. By the early twentieth century, however, attention to civil liberties began to increase and scholars came to note the original role Mason played when he insisted on constitutional protection for a free press and other civil rights. By 1988, Mason was beginning to reap some of the acclaim he deserved for his simple warning: "There is no Declaration of Rights."

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The Nationalization of the Bill of Rights: An Overview

by RICHARD C. CORTNER

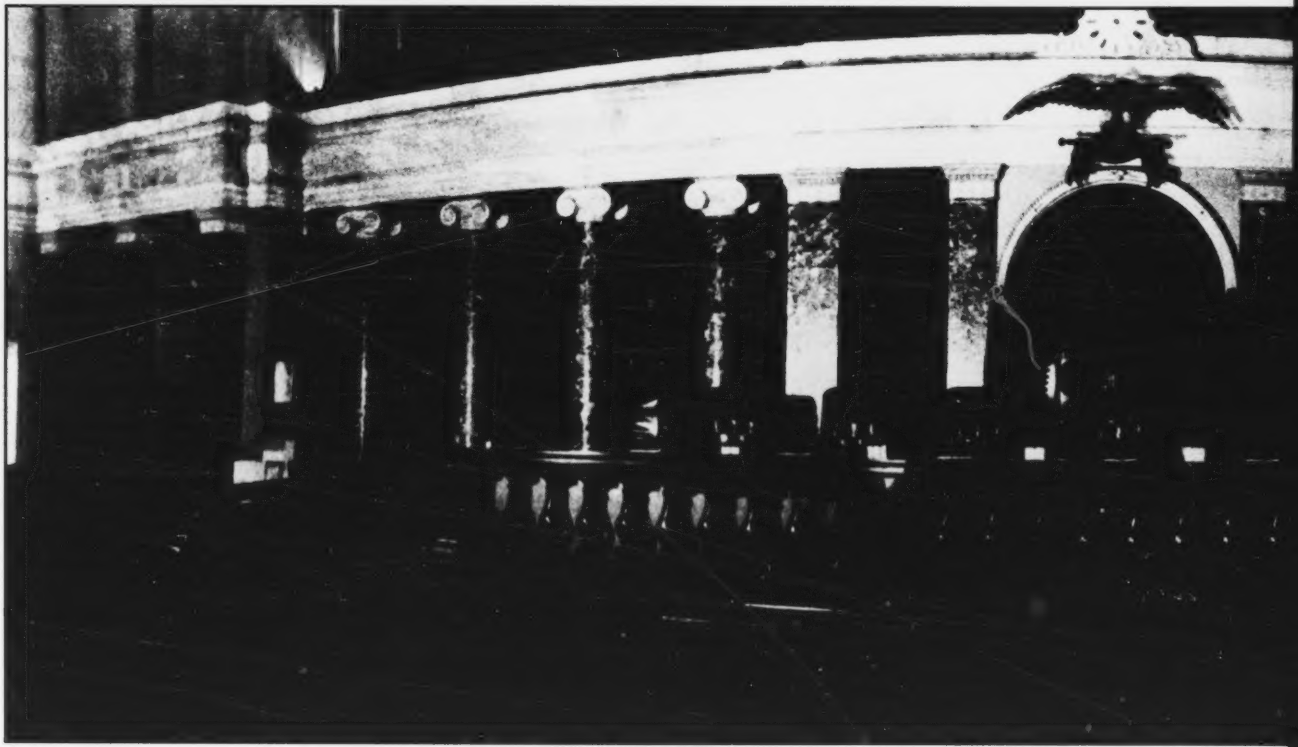
In the 1980s, amid heated discussion about constitutional rights, few Americans recall that for most of our history the Bill of Rights did not apply to the exercise of power by state and local governments. Until the 1920s, only state constitutions and state law prevented local governments from encroaching upon basic liberties such as freedom of speech, press, religion and the right against compulsory self-incrimination.

In 1897, however, the Supreme Court for the first time began to extend the protections guaranteed in the Bill of Rights to exercises of power by state and local governments. That first decision and others since have been based on the Fourteenth Amendment of the Constitution, adopted in 1868 in the wake of the Civil War, specifically the clause that prohibits the states from depriving any person of life, liberty or property without "due process of law." The process by which the Court has applied most of the rights in the Bill of Rights as restrictions upon state and local governments via the "due process" clause of the Fourteenth Amendment is usually referred to as the "nationalization" of the Bill of Rights.

The Constitution that emerged from the Philadelphia convention in 1787 did not of course include a bill of rights; during the ratification struggle in the states, that omission provoked the most heated criticism of the new frame of government. To win over their opponents, the Federalist supporters of the new Constitution promised to consider amendments guaranteeing basic freedoms. Keeping that promise, the first Congress in 1789 submitted for ratification amendments making up the Bill of Rights, drafted largely by James Madison; the Bill of Rights formally became a part of the Constitution in 1791.

Advocates of a bill of rights feared that the new national government created by the Constitution would encroach upon personal liberties. Thus, according to the common understanding of the period, the rights specified in the Bill of Rights checked only the powers of the national government; they did not apply to powers retained by

The chamber of the Supreme Court, 1862–1935 (restored), in the Senate building. Supreme Court Historical Society.

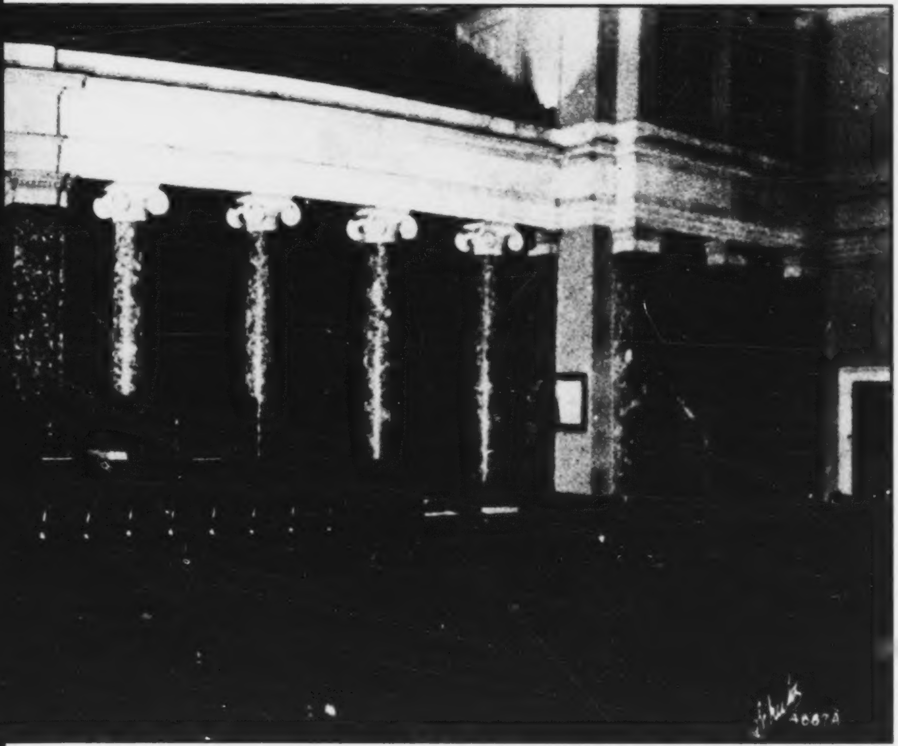


state and local governments. The U.S. Supreme Court confirmed this understanding in *Barron* v. *Baltimore* in 1833, and it became thereby a basic principle of constitutional law.

The Fourteenth Amendment

In 1868, the ratification of the Fourteenth Amendment in the wake of the Civil War placed new restrictions upon state power. Many of its framers entertained the hope that the Fourteenth Amendment's provisions prohibiting the states from denying persons the privileges and immunities of U.S. citizenship (the "privileges and immunities" clause) or denying them life, liberty or property without due process of law (the "due process" clause) might become the bases for guaranteeing fundamental individual rights against deprivation by state and local governments.

Although Congressman John Bingham (R., Ohio) and Senator Jacob Howard (R., Mich.) had suggested during debates on the Fourteenth Amendment in Congress that the privileges and immunities clause might apply all of the Bill of Rights to the states, interpretation of that clause by the Supreme Court denied it such an important role as a source of civil liberties. In the *Slaughter House Cases*, decided in 1873, the Court held that the most basic rights of the individual had state law and state constitutions as their source, notwithstanding the addition of the Fourteenth Amendment to the Constitution, and that the privileges and immunities clause guaranteed only a very narrow spectrum of relatively unimportant rights against deprivation by the states.



This narrow reading of the Fourteenth Amendment carried over as well to the Court's construction of the due process clause, and for a time that clause also seemed destined to become a constitutional dead letter. In 1884, in *Hurtado* v. *California*, the Court rejected an argument that the due process clause required the states to indict defendants in criminal cases by grand juries, a right guaranteed in serious federal criminal cases by the Fifth Amendment of the Bill of Rights; in the process, the Court adopted reasoning that denied that any right specifically guaranteed in the Bill of Rights could apply to the states via the due process clause of the Fourteenth Amendment. The *Hurtado* case therefore appeared to foreclose the possibility that the due process clause would serve as a vehicle for the extension of the rights in the Bill of Rights to the states, just as the *Slaughter House Cases* extinguished the same potential for the privileges and immunities clause.

"Substantive Due Process"

Pressure on the Supreme Court by business interests, however, eventually undermined the reasoning adopted by the Court in the *Hurtado* case. Until 1890, "due process" had been commonly interpreted by the courts as essentially a procedural limitation on governmental power—that is, in taking action depriving persons of life, liberty or property, the government must act in a manner that was procedurally fair. "Due process" meant that individuals had to have notice of the government's action and a hearing before the action occurred. Apprehensive about pending state regulatory legislation, business interests, particularly the railroads, now began to argue that their economic and property rights deserved more than fair governmental procedures under the due process clause, that there were some governmental actions affecting "liberty" and "property" that were illegitimate under the due process clause regardless of how such actions were carried out.

Although initially reluctant to accept this concept of "substantive due process," in an 1890 case, *Chicago, Milwaukee & St. Paul Railroad* v. *Minnesota*, the Supreme Court finally expanded the meaning of the due process clause to embrace substantive rights as well as procedural protections. In doing so, the Court granted broad protection to property rights and also stymied regulation of commercial enterprises by the states. But the new interpretation of due process also had a fundamental impact upon the nationalization of the Bill of Rights. Although most of the rights in the Bill of Rights are procedural, the rights in the First Amendment are substantive. Without the Court's acceptance of the idea that the due process clause embraced substantive as well as procedural rights, the theoretical basis for the application of the First Amendment rights to the states via the Fourteenth Amendment would not have existed.

The breakthrough regarding the nationalization of the Bill of Rights occurred in 1897, *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago*. In this case the Court held that the due process clause required the states when taking private property for a public purpose to give the owners just compensation—a right also guaranteed by the "just compensation" clause of the Fifth Amendment of the Bill of Rights. For the first time a right in the Bill of Rights had been applied to the states via the due process clause of the Fourteenth Amendment.

By its decision in the *Chicago, Burlington & Quincy Railroad* case, the Court implicitly repudiated the reasoning in the *Hurtado* case of 1884, in which it had held that no right specifically guaranteed in the Bill of Rights could apply to the states via the due process clause.

Fundamental Rights

The Court attempted to reconcile the contradiction between the two cases when the next stage of the nationalization process opened in 1908 with the decision in *Twining* v. *New Jersey*. In *Twining*, the Court rejected a claim that the self-incrimination clause of the Fifth Amendment applied to the states via the due process clause, but at the same time it attempted to formulate a general rule governing the relationship of the Bill of Rights to the due process clause. Although the rights in the Bill of Rights did not apply to the states exactly as they applied to the national government, the Court concluded, the due process clause might embrace some rights similar to those in the Bill of Rights because they were essential to the concept of due process of law. The test was this: "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" The *Twining* case thus opened the door to the future application to the states of some rights at least similar to some of those in the Bill of Rights.

Despite the promise of the *Twining* case, the nationalization process nevertheless stalled for seventeen years. Then, in 1925, the Court reviewed Benjamin Gitlow's conviction in New York for advocating the violent overthrow of the government, which he claimed deprived him of freedom of expression under the due process clause of the Fourteenth Amendment. While the Court affirmed the conviction in *Gitlow* v. *New York* in 1925, it took a major step in the nationalization process by declaring that for "present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."

Whether the "assumption" in the *Gitlow* case was a reality remained unclear until 1931. In that year, the Court decided *Stromberg* v. *California* and *Near* v. *Minnesota* and ruled squarely that the due process clause guaranteed both freedom of speech (*Stromberg*) and freedom of the press (*Near*). "It is no longer open to doubt," Chief Justice Charles Evans Hughes wrote in the *Near* case, "that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment. It was found impossible to conclude that this essential liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property."

After the freedoms of speech and press had been nationalized, the question remained about other rights in the First Amendment. Did they come under the Court's definition in the *Twining* case, as fundamental principles of liberty and justice which inhere "in the very idea of free government" and which are

Without the Court's acceptance of the idea that the due process clause embraced substantive as well as procedural rights, the theoretical basis for the application of the First Amendment rights to the states via the Fourteenth Amendment would not have existed.

"the inalienable right of a citizen of such a government"? The Court addressed these questions in short order. The right of assembly and petition, the free exercise of religion and the prohibition of an establishment of religion were held to be applicable to the states via the due process clause in the Court's decisions in *DeJonge* v. *Oregon* (1937), *Cantwell* v. *Connecticut* (1940) and *Everson* v. *Board of Education* (1947). By 1947, therefore, the nationalization of the First Amendment was complete, with all of the rights in that amendment having been held to be applicable to the states via the due process clause.

Criminal Procedure

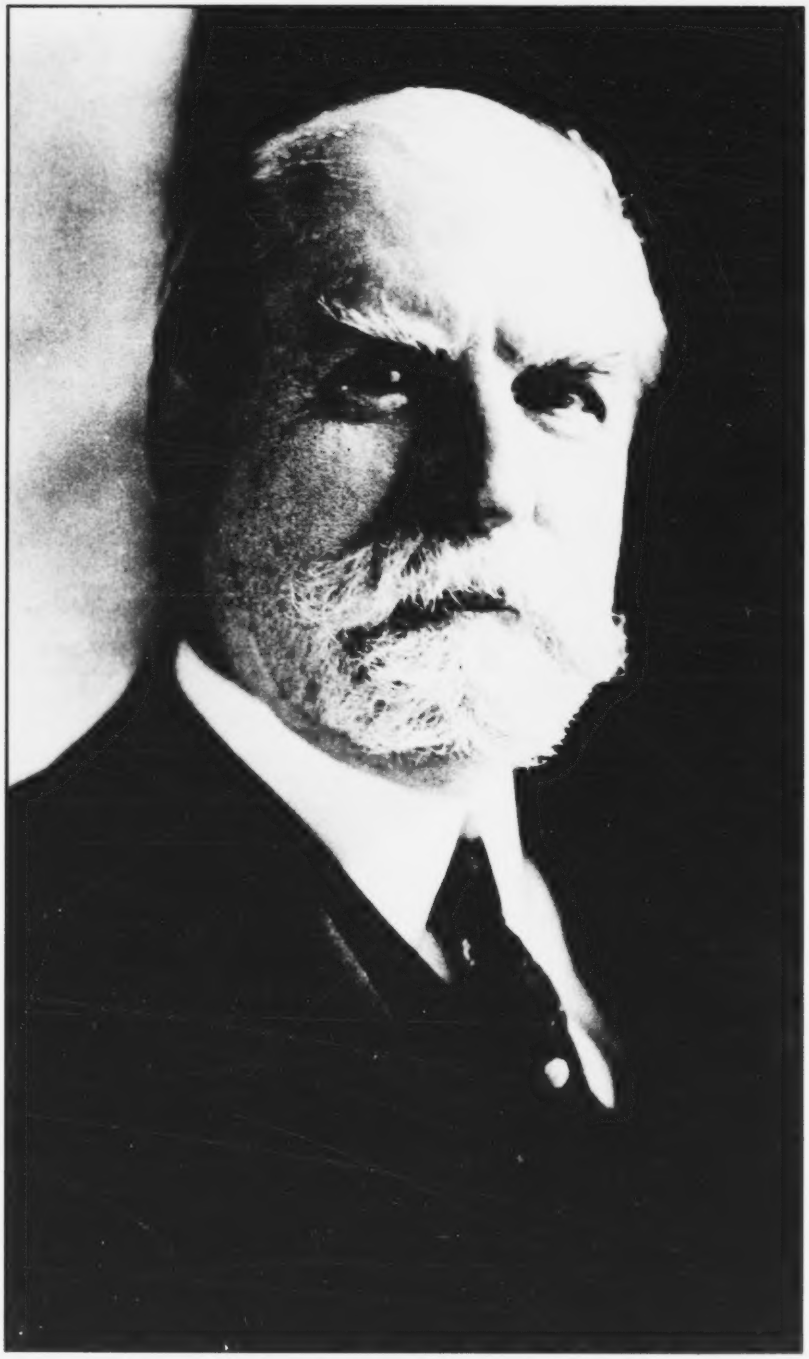
The third phase of the nationalization of the Bill of Rights paralleled the nationalization of the First Amendment and concerned the question of which criminal procedure protections like those in the Bill of Rights applied to the states. The Court first began to increase its attention to questions of criminal procedure under the due process clause in *Moore* v. *Dempsey* in 1923. At its most rudimentary level, "due process" had always required that the defendant receive adequate notice of the charges and a fair trial or hearing in criminal cases, but in *Moore* v. *Dempsey* the Court began to insist that state criminal trials must be fair in fact as well as form to meet the requirements of "due process." If a defendant's trial met proper formal standards but the trial was mob-dominated, the Court held in *Moore*, the state had nevertheless violated due process of law.

Following the fair trial rule that emerged from *Moore* v. *Dempsey*, the Supreme Court focused more closely on which elements were necessary to ensure a fair trial in fact as well as form. In *Powell* v. *Alabama*, decided in 1932, it ruled that uneducated, indigent black youths could not receive a fair trial in a capital case unless they were afforded the effective assistance of state-appointed counsel in their defense. In 1936, the Court similarly held in *Brown* v. *Mississippi* that the admission of a coerced confession as evidence against a state criminal defendant also violated the due process clause. In neither *Powell* v. *Alabama* nor *Brown* v. *Mississippi*, however, did the Court hold that the "assistance of counsel" clause of the Sixth Amendment or the Fifth Amendment's "self-incrimination" clause applied to state criminal trials under the due process clause. Rather, the Court was focusing on the question of whether fair trials had in fact been afforded the defendants in those cases, and it concluded that the lack of counsel in a capital case and the use of a coerced confession as evidence denied the right to a fair trial.

In the *Powell* and *Brown* cases, the Court was therefore following the rule of the *Twining* case, that the due process clause imposed upon the states in the conduct of criminal trials certain rights *similar* to some of those in the Bill of Rights, but if such rights did apply to the states, they were only similar and not identical to their counterparts in the Bill of Rights. The "fair trial" rule, involving the application to state criminal trials of rights similar but not identical to some of those in the Bill of Rights, became the Court's dominant approach to issues of criminal procedure under the due process clause until 1961.

Thus, by the late 1930s, the Court had not only begun the nationalization of the First Amendment, which it would complete in 1947, but it had also started tightening the meaning of due process in state criminal trials. The Court took the occasion of its decision in *Palko* v. *Connecticut* in 1937 to restate the general principles it was following in the nationalization of the Bill of Rights. Speaking for the Court in the *Palko* case, Justice Benjamin Cardozo at the outset rejected the argument that the due process clause applied all the rights in the Bill of Rights to the states. If some but not all of the rights in the Bill of Rights applied to the states, the question then became one of how the Court distinguished between those rights that did apply to the states and those that did not. The answer, Cardozo said, was that the due process clause imposed upon the states those rights that were "of the very essence of a scheme of ordered liberty," such as freedom of speech, as well as those rights of criminal procedure that were "essential to the substance of a hearing." The question of whether a state criminal trial violated the due process clause, Cardozo added, was whether it involved "a hardship so shocking that our polity will not endure it." Applying this test to the *Palko* case, he concluded that the Fifth Amendment's prohibition of double jeopardy was not applicable to the states, just as the right to be indicted by a grand jury, right against compulsory self-incrimination, and jury trials in criminal and civil cases were equally inapplicable to the states via the due process clause.

The decision in the *Palko* case expressed the consensus the Court had reached regarding the nationalization of the Bill of Rights at the end of the 1930s, but it left unclear whether the First Amendment rights which had been nationalized were *similar* or *identical* to those in the Bill of Rights. Was the freedom of speech and of the press, recognized in the *Stromberg* and



Charles Evans Hughes, *Chief Justice of the United States, 1930–1941. Library of Congress.*

Near cases in 1931, somehow different from the freedoms of speech and press guaranteed in the First Amendment? The Court soon provided the answers. By the early 1940s, the language used in its decisions involving First Amendment rights clearly indicated that it considered the First Amendment rights applicable to the states to be identical, not merely similar, to those in the First Amendment itself. The result was, however, considerable theoretical tension between the Court's treatment of First Amendment rights and its treatment of criminal procedure rights under the due process clause.

Despite the disparate treatment by the Court of nationalized First Amendment rights and rights of criminal procedure, its adherence to the fair trial rule did yield two important decisions in the field of criminal procedure during the 1940s. In a 1948 decision in *In re Oliver*, the Court stated that the due process clause required the states to hold public criminal trials, a requirement that was also a part of the Sixth Amendment. And in *Wolf* v. *Colorado*, decided in 1949, the Court declared that the due process clause embraced at least "the core" of the Fourth Amendment and therefore prohibited state officers from engaging in unreasonable searches and seizures. It further held, however, that the federal exclusionary rule, which barred from trial evidence seized in violation of the Fourth Amendment, did not apply to the states. So, after *Wolf* v. *Colorado*, state officers were prohibited from engaging in unlawful searches and seizures, but the evidence they obtained by such illegal measures could continue to be admitted as evidence in state criminal trials.

Total Incorporation?

A 1947 case revealed that the consensus of the Court regarding the nationalization issue, expressed in *Palko*, had been shattered. In *Adamson* v. *California*, the majority of the Court once again rejected the proposition that the Fifth Amendment's self-incrimination clause applied to the states and reaffirmed the ruling in *Twining* v. *New Jersey* on that point. Justice Hugo Black dissented however, contending that a study of the historical evidence regarding the proposal and ratification of the Fourteenth Amendment had convinced him that the intent of the framers of the amendment was to apply all of the Bill of Rights to the states in the identical way in which it applied to the national government. He argued

The test was this: "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?"

further that defining the meaning of the due process clause of the Fourteenth Amendment to embrace all of the rights in the Bill of Rights would prevent the Court from reading its own personal predilections into the due process clause.

Black's position favoring the "total incorporation" of the Bill of Rights into the due process clause had been anticipated by Justice John Marshall Harlan I during the nineteenth and early twentieth centuries, but Harlan had usually been in lonely dissent on that issue. Black's dissent in the *Adamson* case, however, attracted the support of three of his colleagues, Justices William O. Douglas, Wiley Rutledge and Frank Murphy, so that the "total incorporation" position received the largest number of votes in the *Adamson* case than it had ever received before. The majority position was vigorously defended by Justice Felix Frankfurter in a concurring opinion in the *Adamson* case, and despite Black's challenge in his dissent, the *Twining* "fair trial" approach to the nationalization of criminal procedure rights remained dominant throughout the 1950s.

Selective Incorporation

During the late 1950s, a new approach to the theory of nationalization, offered by Chief Justice Earl Warren and Justice William Brennan, began to emerge on the Court. The new theory came to be called "selective incorporation," since the theory rejected Black's argument that all of the rights in the Bill of Rights applied to the states via the Fourteenth Amendment. However, the selective incorporationists agreed that most of the rights in the Bill of Rights did apply to the states, and they agreed with Black on a crucial issue—that if a right in the Bill of Rights did apply to the states, it applied in the identical way as it applied to the national government.

The incorporationist theory of nationalization was stoutly resisted by Justice John Marshall Harlan II (grandson of the total incorporationist) throughout the 1960s. Harlan insisted that the Bill of Rights had not been intended historically to apply to the states at all. The due process clause of the Fourteenth Amendment, he conceded, did impose upon the states certain fundamental rights similar to those in the Bill of Rights, but the crucial point for Harlan was that those rights found in the due process clause had as their source the due process clause itself and were therefore only similar to but not identical to the rights in the Bill of Rights. Despite Harlan's eloquent defense of his position, he was increasingly isolated on the Court.

The breakthrough for the incorporationists came in *Mapp* v. *Ohio* in 1961, when a majority of the Court held that the full Fourth Amendment as well as the federal exclusionary rule, forbidding the use of illegally seized evidence in court, applied to the states via the due process clause. There followed a series of decisions in which the Court held that "cruel and unusual punishments" clause of the Eighth Amendment (*Robinson* v. *California*, 1962), "assistance of counsel" clause of the Sixth Amendment (*Gideon* v. *Wainwright*, 1963), self-incrimination clause of the Fifth Amendment (*Malloy* v. *Hogan*, 1964), the provisions in the Sixth Amendment guaranteeing defendants the right to confront and cross-examine prosecution witnesses (*Pointer* v. *Texas*, 1965), the right to a speedy trial (*Klopfer* v. *North Carolina*, 1967), the right to subpoena favorable witnesses (*Washington* v. *Texas*, 1967), and the right to a trial by jury (*Duncan* v. *Louisiana*, 1968), and, finally, the double jeopardy clause of the Fifth Amendment (*Benton* v. *Maryland*, 1969) were applicable to the states in the identical way in which they applied to the national government. With the completion of the nationalization process in the *Benton* decision in 1969, the only rights remaining in the Bill of Rights that had not been made applicable to the states were the Second and Third Amendments, the "grand jury indictment" clause of the Fifth Amendment, the Seventh Amendment's requirements of jury trials in civil cases and the "excessive fines and bail" clause of the Eighth Amendment.

When he introduced in Congress his proposed amendments that would become the Bill of Rights, James Madison had included restrictions on state powers as well as those directed at the national government, but Congress ultimately rejected the proposed restrictions on state power. By the time the Supreme Court had concluded the nationalization of the Bill of Rights in the late 1960s, however, it had more than made up for Madison's failure to restrict the powers of the states in 1789. Indeed, the Court had through the nationalization process transformed the "due process" clause of the Fourteenth Amendment into a second bill of rights applicable to the states—a bill of rights far more salient to the liberty of the average American than the original authored by Madison and ratified by the states in 1791.

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The Bill of Rights: Protector of Minorities and Dissenters

by NORMAN DORSEN

The American political system is built upon two fundamental principles. The first is majority rule through electoral democracy. This precept is firmly established in our culture. The second fundamental tenet is less established, less understood, and much more fragile. This is the principle that even in a democracy the majority must be limited in order to assure individual liberty.

The Bill of Rights—the first ten amendments to the Constitution—is the primary source of the legal limits on what the majority, acting through the government, can do. Such limits guarantee rights to all but in practice they often serve to protect dissenters and unpopular minorities from official wrongdoing. This process is indispensable to a free society, which in turn is the highest purpose of organized government. As John Locke wrote, "However it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom."

How the Bill of Rights came to be appended to the original Constitution is a fascinating tale. How over two centuries it came to mean what it does today is a complex story which is not over yet. In the words of Chief Justice John Marshall, the Constitution is a document "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

The original Constitution protected civil liberty but it did so incompletely. The principal means it employed was structural—the ingenious carving up of governmental power both vertically and horizontally, through the creation of a federal system and the separation of powers within the national government.

It is well known that the Constitution created a national government possessing only limited powers, leaving to the states all other powers over its inhabitants. Although state authority could not be exercised inconsistently with the Constitution or acts of Congress, this formula nevertheless left the states with dominant authority over the people's welfare.

The Constitution also created a tri-partite division of national authority by reposing separate spheres of power in the Executive, Legislative and Judicial branches. While the chambers are not airtight, they serve to fulfill the theory of our government, which (as the Supreme Court said in 1874) "is opposed to the deposit of unlimited power anywhere."

The original Constitution did not merely seek to enhance civil liberty by dividing the authority to rule. It also contained some explicit safeguards. It provided that the privilege of habeas corpus, which requires a judge to release an imprisoned person unless he is being lawfully detained, may not be suspended except in cases of rebellion or invasion. The ex post facto and bill of attainder clauses seek to guarantee legislative fairness by prohibiting laws that make new crimes out of conduct that has already occurred and by requiring laws to operate generally and not against particular people. Article III guarantees a jury trial in all federal criminal cases, defines treason narrowly, and imposes evidentiary requirements to assure that this most political of crimes will not be lightly charged. Article VI prohibits religious tests as a qualification for public office.

But these safeguards were not enough. In 1787, many people were displeased by the absence of an explicit Bill of Rights in the newly-drafted Constitution, and some state conventions refused to ratify without a commitment, or at least a strong indication, that one would soon be introduced. The Framers promptly made good on this commitment, and the Bill of Rights was ratified in 1791. Thus the new nation's novel and creative structure that simultaneously provided for majority rule and limitations on that rule was in place.

Two further ingredients were needed to make the system work. The first occurred in 1803, when the Supreme Court unanimously ruled in *Marbury* v. *Madison* that the federal courts could enforce the Constitution by invalidating statutes passed by Congress that were inconsistent with it. In the twentieth century, the Supreme Court put the final component in place by holding that almost all provisions of the Bill of Rights restrict unlawful actions by state and local officials as well as the national government.

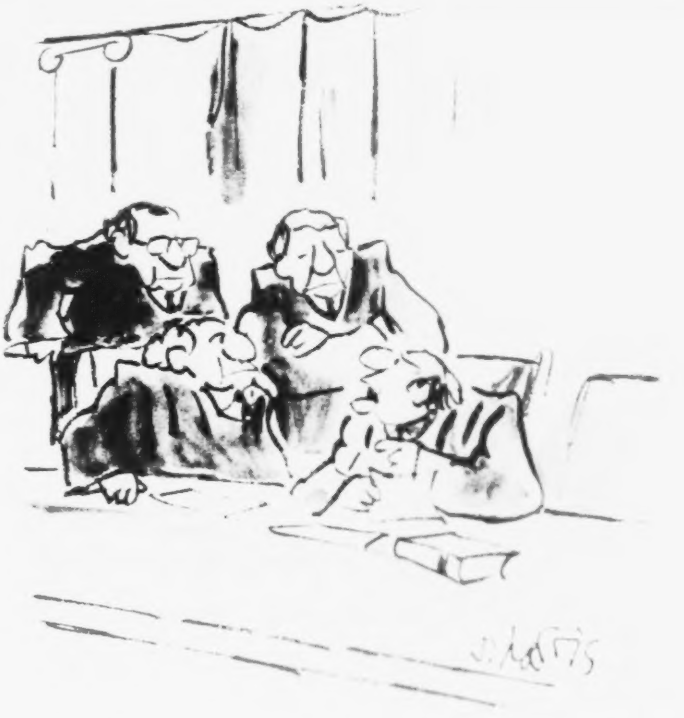
The Bill of Rights protects all Americans, but it is of particular value to minorities and dissenters. Supreme Court Justice Hugo Black expressed this thought eloquently in 1940:

> Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.

While the Supreme Court has not always been faithful to that trust, it has often used the Constitution to shield the powerless.

Free Expression

The First Amendment guarantees of free speech and free press serve an especially important function in this respect by prohibiting the government from forcing everyone to espouse officially sanctioned opin-



"SURE I'M A STRONG DEFENDER OF THE FIRST AMENDMENT AND ALL ITS RAMIFICATIONS BUT IT'S VERY CLEAR THAT IF HE CALLED US A BUNCH OF JERKS, THAT'S LIBEL."

ions. Early Supreme Court cases on free speech were not promising. During World War I, appellants had been prosecuted for opposing enlistment in the armed services and protesting American involvement in the war, extremely unpopular positions at that time. The convictions were all affirmed in 1919, and the defendants jailed, some for many years. However, by 1931 an enthusiastic displayer of a red flag and the publisher of a "scandalous and defamatory" newspaper won their free speech and free press cases, although they were equally unpopular to most Americans. Fittingly, public debate and private reflection had begun to lead informed opinion to appreciate the value of free expression in a free society. Justice Oliver Wendell Holmes, who wrote the opinion sustaining the first convictions for speech relying on a "clear and present danger" standard, voted to reverse the later convictions.

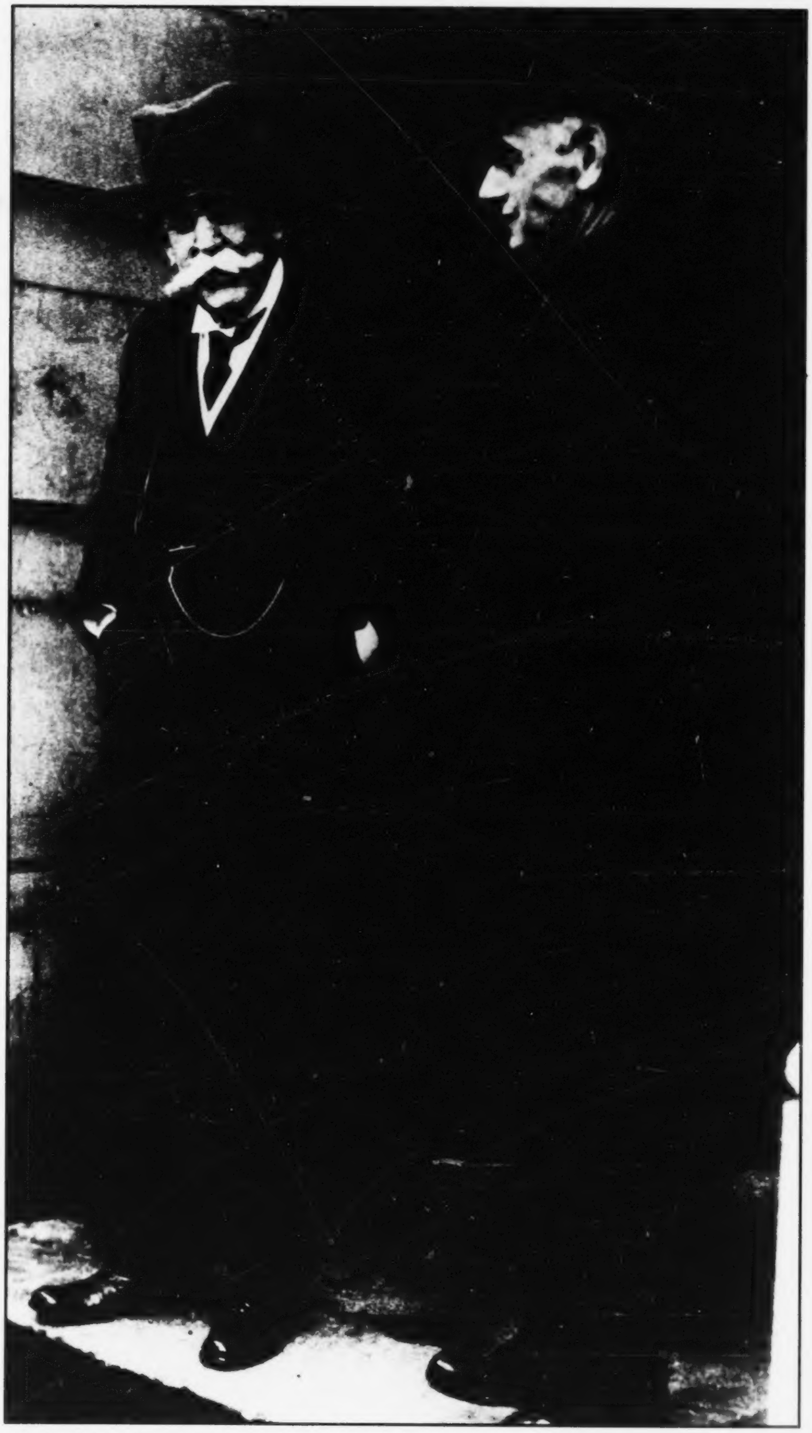
From the 1930s through the 1950s, free speech claims were pressed by Communist activists and radical labor union leaders, and in the 1960s and 1970s by civil right protestors, the Ku Klux Klan and the American Nazi Party. Although the results were mixed, in 1969 the Supreme Court enunciated the principle— broadly protective of free expression—that political expression cannot be punished unless it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

The Court has not been as hospitable to claims under the First Amendment when "speech" and "non-speech" elements are combined in the same course of conduct. The Court has protected the right of children to wear an armband to class to protest the Vietnam War and the right to burn or disfigure the American flag for the same purpose. But it sustained the conviction of a man for burning his draft card as a protest against the war. More recently, it rejected protests against the government's policies towards poor people that were expressed through the form of sleeping outdoors in a public park.

The framers of the First Amendment expected it to promote democratic self-government and facilitate orderly social change through the medium of new and unfamiliar ideas; to check possible government corruption and excess; and to advance knowledge and reveal truth, especially in the arts and sciences. The framers recognized that some speech would be controversial, some even repugnant. But their belief in free speech rested upon the premise that censorship brought worse consequences. As Justice Brandeis wrote in 1927, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."

A free society has confidence in its people to separate the wheat from the chaff. A wise and principled conservative, Justice John Marshall Harlan, recognized that "the constitutional right of free expression is powerful medicine in a society as diverse as ours." "It is designed," he said,

> . . . to remove governmental restraints from public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry . . . and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.



Oliver Wendell Holmes, Associate Justice, 1902–1932 (left) and Louis D. Brandeis, Associate Justice, 1916–1939. Supreme Court Historical Society.

The desirability of protecting unpopular expression also rests on hard practical considerations. The government apparatus required to impose limitations on speech, by its very nature, tends toward administrative extremes. History has shown that the techniques of enforcement—chilling investigations, surveillance of lawful activity, secret informers, unauthorized searches of homes and offices—are often carried out by police or zealous officials without adequate concern for the consequences of their actions.

Religious Freedom

The First Amendment also contains two clauses providing for religious liberty: one guarantees the "free exercise of religion" and the other bars laws that put state power behind religion or entangle the state with religious activities. These clauses also have served to safeguard minorities. This protection seems particularly appropriate because many of our early settlers—Puritans, Roman Catholics, Huguenots, and others—fled religious persecution in Europe, where the dominant national churches were often intolerant and cruel to those who professed dissenting beliefs. At different times in American history, Christian sects, Jews, Mormons, and atheists all have relied on the First Amendment guarantee of religious liberty to protect their rights against official and private discrimination; more recently Moslems, Buddhists, and the Unification Church have also done so. Few constitutional provisions have proved more decisively that guarantees of liberty must be accorded to all or they will erode.

Controlling State Action

Additional provisions of the Bill of Rights protect unpopular individuals and groups from other kinds of state action. The Fourth Amendment guarantee that the people will be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" can be traced to English history. In 1763, repeated abuses led William Pitt the Elder to defend in Parliament the sanctity of one's home:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may

The doctrine of judicial review, which gives the courts final authority to define constitutional rights, is the most important original contribution to the American political system to civil liberty.

enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

In response to such protests, Parliament enacted new legal protections in England. But high-handed treatment by British governors was, in the words of the Supreme Court, "fresh in the memories of those who achieved our independence and established our form of government." The right of a person to privacy in his or here home became one of the essentials of our constitutional system.

The lessening of restraints on official misconduct would undermine the rights of all. Although private property is not always a refuge, police and other officials must secure a judicial warrant based on probable cause or they must justify a search on other grounds. The alternative to these safeguards is a regime where no citizen is safe from a dreaded knock on the door by officers who, unaccountable to law, may violate privacy at their discretion, the very evil the Fourth Amendment was designed to prevent.

Similarly, the right to counsel contained in the Sixth Amendment prevents the government from misusing its power by providing that citizens are entitled to legal advice when accused of crime. In the famous Scottsboro case (*Powell* v. *Alabama*, decided in 1932), the Supreme Court reversed the death sentence of black teenagers who were convicted of raping two white women in a trial in which they were denied lawyers. A generation later, the Court held that the public must pay for lawyers if an accused lacks funds, recognizing that without the assistance of counsel it is virtually impossible for a defendant, guilty or innocent, to mount a creditable defense against a government charge.

Equal Treatment

Despite its broad reach, the Bill of Rights (like the Constitution itself) was incomplete because it did not address outright the issue of inequality or prohibit government discrimination. The original Constitution in several clauses countenanced slavery, and in most states the right to vote at the time of ratification was limited to property-holding white males. Although the Fourteenth Amendment attempted to erase disabilities against former slaves by prohibiting states from denying the "equal protection of the laws," the end of Reconstruction in the South after 1876 and unsympathetic Supreme Court decisions undercut the promise of equality for generations.

After a long campaign by civil rights groups, the Supreme Court in 1954 invalidated state-supported segregation in *Brown* v. *Board of Education*, and the movement towards equal treatment gathered momentum. Much public and private discrimination persists in the United States, but there have been enormous gains in recent decades as Congress, the Executive Branch, and the states, reinforced by judicial decisions, have provided increased protection for racial minorities, women, nonmarital children and other vulnerable groups.

Judicial Guardians

The courts have also identified certain liberties not expressly enumerated in the Bill of Rights but well grounded in the constitutional structure, such as freedom of association and the rights to travel and sexual privacy. These rights tend to come under attack when individuals wish to exercise them in a way that offends the majority. Thus, Alabama sought to interfere with the associational rights of the NAACP, the federal government sought to deny Communists the right to travel abroad, and many states imposed restraints on abortion. The protection of these individual rights not only comports with the premises of a free society but is supported by the language of the Ninth Amendment, which provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Bill of Rights was not designed as an abstraction. If it were, the rights it contains would have no more value than the barren promises entombed in many totalitarian constitutions. To be real, rights must be exercised and respected. The political branches of government—legislators and executive officials—can be instrumental in protecting rights, but majoritarian pressures on elected representatives are great during times of crisis, when the stress on liberty is most acute. A nation threatened from without is rarely the best guardian of civil liberties within. As already noted, President Wilson presided over massive invasions of free speech during World War I. In addition, President Roosevelt approved the internment of Japanese Americans during World War II, and McCarthyism, the virulent repression of dissent, was a product of the Cold War of the late 1940s and early 1950s.

The vulnerability of politically accountable officials to popular pressure teaches that freedom is most secure when protected by life-tenured judges insulated from electoral retribution. The doctrine of judicial review, which gives the courts final authority to define constitu-

Protest against the Vietnam War outside the Pentagon, 1967. Library of Congress.

tional rights, is the most important original contribution of the American political system to civil liberty. James Madison summed it up when he said in proposing a bill of rights, "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive." Thus, judicial review reinforces the central premise of the Bill of Rights that even in a democracy the majority must be subject to limits.

* * * *

While the principles of the Bill of Rights are timeless, experience teaches that civil liberties are never secure, but must be defended again and again in each generation. Examples of frequently repetitive violations of the Bill of Rights include police misconduct, school book censorship, and interference with free speech and assembly. Thus, the American Civil Liberties Union found it necessary to assert the right of peaceful demonstration when that right was threatened by Mayor Frank Hague's ban of labor organizers in New Jersey in the 1930s, by Sheriff Bull Connor's violence to civil rights demonstrators in Alabama in the 1960s, by the government's efforts to stop antiwar demonstrators in Washington in the 1970s, and by the legal barriers erected by the city of Skokie, Illinois, in 1977–78 to prevent American Nazis from parading.

The defense of the rights of Americans is often thankless. Strong opponents have invoked both necessity and patriotism while subverting liberty and dominating the weak, the unorthodox, and the despised. Government efficiency, international influence, domestic order, and economic needs are all important in a complex world. But none is more important than the principles of civil liberty and human dignity embodied in the Constitution and Bill of Rights, our proudest heritage.

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Slavery at the Philadelphia Convention

by PAUL FINKELMAN

For the nineteenth century abolitionist William Lloyd Garrison, the Constitution was a terrible bargain, "a covenant with death" and an "agreement with Hell." In reviewing the first publication of James Madison's *Notes on the Federal Convention of 1787*, Wendell Phillips, Garrison's brilliant ally, underscored the compromise over slavery at the Convention. The *Notes* confirmed Phillips' suspicion that slavery had been a critical issue at the Convention and that "the Nation at large were fully aware of this bargain at the time, and entered into it willingly and with open eyes."

What was the nature of this bargain? Did the framers willingly enter into a bargain with slavery? Which of the framers participated in this bargain, and why? The answers to these questions can be found by examining the text of the Constitution and the Convention and ratification debates.

These sources suggest that the Garrisonians were more right than wrong in their analysis. Throughout the Convention, slavery affected the debates on many issues, including representation in Congress, the method of choosing the president, and the commerce clause. Ultimately the Constitution *did* protect slavery; and the convention debates show that this outcome was no accident. In fact, the founders gave away more than they had to, if achieving union was their only goal. Economic objectives led northern delegates to agree to additional protections for slavery, in return for commercial concessions from southerners.

The debates over slavery raised political, economic, and moral questions. Some of the gains for slavery at the convention were the result of compromises that the framers believed to be necessary in order to create a stronger union: the "three-fifths clause," for example. The South insisted on including slaves in the formula for determining representation, and the North quickly gave in on this point.

But other concessions were economic and not necessary to win the southern states over to the Constitution. The South objected to taxes on exports because it feared such taxes would undermine its slave-based economy, which produced tobacco, rice, and other commodities for sale overseas. Although some northerners, and even a few southerners, objected to losing this source of revenue, the South gained a complete victory on this issue without great difficulty.

Other economic clauses were even more problematical. Most of the delegates from north of the Carolinas agreed that the slave trade was immoral, but some northern delegates were willing to allow it as part of an elaborate compromise over the power of Congress to regulate commerce. The Constitution prohibited Congress from stopping the importation of African slaves for twenty years, but significantly the Constitution did not guarantee an end to the African trade after that time.

Finally, the fugitive slave clause burdened the free states by obligating them to return runaway slaves. The South asked for this provision in late August, and the delegates from the North, even those who intuitively knew that the clause was morally, if not politically, wrong failed to put up much of a fight. By this time the delegates had been in Philadelphia for over three months and they no doubt wanted to end the Convention and go home.

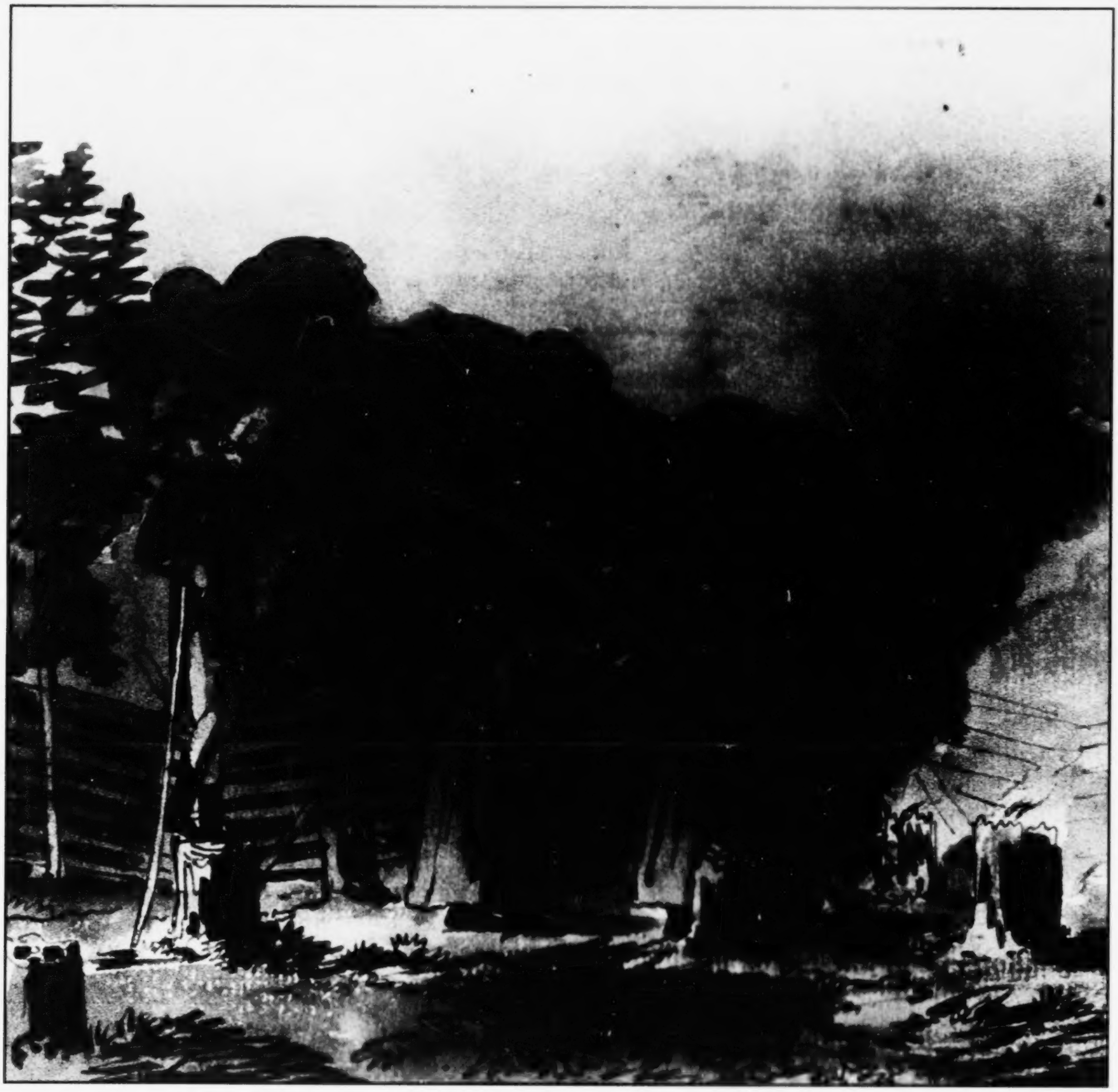
Slavery at the Convention

Slavery and sectionalism permeated the Convention debates. At the beginning of the Convention the delegates from the large and small states engaged in heated debate over the nature of representation under the emerging Constitution. But during this debate James Madison suggested that these were in fact false issues. The real conflict lay not between the large and small states, but between the northern and the southern states. Madison argued (as he wrote in his *Notes on the Federal Convention*):

> that the States were divided into different interests not by their difference in size, but by other circumstances; the most material of which resulted partly from climate, but principally from their having or not having slaves. The two causes concurred in forming the great division of interests in the U. States. It did not lie between the large and small States: it lay between the Northern and Southern, and if any defensive power were necessary, it ought to be mutually given to those two interests.

By the middle of the Convention, most of the other delegates had come to agree with Madison. After the "Great Compromise" solved the small state-large state conflict, the convention debates tended to be extremely sectional in nature. During August, there were heated debates over taxation, commerce, and political power. In all these debates, slavery was almost always an underlying issue; often it was *the* issue.

The debates which most illustrate the problem of slavery and sectionalism at the Convention were those over the three-fifths clause and the African slave trade. Both took up a great deal of time and energy at the Convention. Both debates directly involved slavery. Yet, despite these similarities, the



"An overseer doing his duty. Sketched from life near Fredericsburg," 1798, by Benjamin Latrobe. Maryland Historical Society, Baltimore, MD.

two debates were in many ways quite different.

Slavery and Representation

The "three-fifths" debate was essentially over political power. The Convention delegates accepted the notion that republican government required that wealth, as well as people, should be represented in the legislature. The delegates assumed that counting all the free people in a community would be a good basis for representation, because all the free people had interests which needed to be protected and because they all contributed to the society. Slaves, however, posed a problem. They were not citizens and were therefore prohibited from participating in the political system. Furthermore, they had no interests that their owners wanted to have represented by other citizens in the government. On the contrary, the interests of slaveowners were in opposition to those of the slaves.

Southerners argued, however, that slaves produced a great deal of wealth, which benefited the entire nation. Thus, they demanded that any scheme for representation based on population include slaves. In the early part of the Convention, demands for basing representation on "wealth" became a euphemism for counting slaves. For political purposes northerners would have preferred not to count slaves at all. The South, on the other hand, wanted slaves counted fully for purposes of representation. The three-fifths clause emerged as a compromise. The clause did not stamp the black as "three-fifths of a person." Rather, the clause simply recognized that slaves were an integral part of America. The net result, however, was that the votes of southern whites were worth more

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Slavery and sectionalism permeated the convention debates.

than those of northerners in the election of representatives to Congress and in presidential elections.

While some northern delegates registered moral indignation over the three-fifths clause, the debates raised moral questions only indirectly. Slavery, after all, already existed in the states. Slaves were people, and they did constitute an important aspect of the economic contributions of the South. Even Rufus King of Massachusetts, who despised slavery and objected to most concessions in its favor, admitted that the South deserved some recognition for its "superior wealth"—a wealth based on slaves.

Yet, the compromise was not an easy one for all delegates. When the three-fifths clause was first proposed, Elbridge Gerry of Massachusetts protested vigorously. He argued that "Slaves [ought] not to be put upon the Footing of freemen," and that the "Freemen of Massts. [ought] not to be put upon a Footing with the Slaves of other States." He sarcastically suggested that "Horses and Cattle ought to have the Right of Represent[ation]" if slaves were also to be counted. Gerry's complaint was fundamentally political, but he implied an ethical issue as well—the immorality of obscuring the distinction between free people and slaves. In a subsequent debate, New Jersey's William Paterson asked, with some irony, if a Virginian would have "a number of votes in proportion to the number of his slaves?" Again, the question of political power was part of the debate. But Paterson, like Gerry, also raised a moral issue, noting that counting slaves for representation encouraged the African slave trade. Pennsylvania's Gouverneur Morris declared he could "never agree to give such an encouragement to the slave trade ... by allowing them a representation for their negroes." But what Morris would never agree to, the South could not live without.

Throughout the Convention, the southern delegates had made clear their demand that slaves be counted for calculating the numbers of representatives in Congress that each state would get. In response to Morris, William Davie, a relatively obscure delegate from North Carolina, made his first major contribution to the debates, declaring "it was high time now to speak out." Davie declared that the South would "never confederate" if slaves were not counted for representation. The three-fifths compromise was the minimum acceptable to him. Davie warned that if the delegates adopted anything less, "the business [of the Convention] was at an end." The three-fifths clause became the rule for representation with very little recorded opposition. On the last vote on the clause every state but New Jersey supported the compromise.

The Slave Trade, the Fugitive Slave Clause, and the Second "Great" Compromise

In his last attempt to block the three-fifths clause, Gouverneur Morris tied it directly to the right of the southern states to import slaves from Africa. He asserted that counting slaves for representation

> when fairly explained comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a Govt. instituted for the protection of the rights of mankind, than the Citizen of Pa. or N. Jersey who views with a laudable horror, so nefarious a practice.

While Morris had no chance of defeating the three-fifths clause, it is likely he hoped to win on the slave trade. Allowing the slave trade to continue, after all, was substantially different from the three-fifths clause. Importing new slaves was hardly the same thing as taking into account the economic and political realities of existing slavery. Many slaveowners found the African trade distasteful or immoral, even though they had few qualms about owning slaves. Northerners who could tolerate a political compromise over existing slaves would not necessarily accept the idea that they sanctioned the importation of new slaves. As one New Yorker would complain during the ratification struggle, the Constitution's slave trade clause condoned "drenching the bowles of Africa in gore, for the sake of enslaving its free-born inhabitants." A Virginia Anti-Federalist complained that the slave trade provision was an "excellent clause ... in an Algerian constitution: but not so well calculated ... for the latitude of America."

These sentiments expressed the attitude of some delegates at the Convention. John Dickinson considered the African trade "inadmissible on every principle of honor and safety." George Mason declared that slavery would "bring the judgment of heaven" and produce "national calamities." But Mason's attack on slavery did not mean he wanted to end the institution. As a slaveholding Virginian, that was hardly his agenda. Mason merely wanted to empower Congress to prohibit the importation of new slaves. Virginia had an oversupply of slaves and thus could not only afford to see an end to the African trade, but Virginians might profit

If the compromise over representation was the "Great Compromise," then it is fair to label this one the "Dirty Compromise" of the Federal Convention. New England supported the Deep South's demand for the slave trade not to ensure acceptance of a new constitution but in return for southern support for northern shipping interests.

from it by being able to sell their excess slaves to South Carolina and Georgia.

The delegates from South Carolina and Georgia, on the other hand, argued that the slave trade was absolutely necessary for the economic development of their states. If the convention prohibited the slave trade, South Carolina's Charles Cotesworth Pinckney predicted that his state would not ratify the Constitution. He declared that "South Carolina and Georgia cannot do without slaves." A prohibition of the trade would be "an exclusion of S. Carol[in]a from the Union." Here Pinckney equated a continuation of the slave trade with a continuation of slavery itself. Pinckney's sentiments were echoed by the rest of the South Carolina delegation, as well as delegates from Georgia and North Carolina.

During the debate over the slave trade the delegates from the Deep South received curious support from New England. Elbridge Gerry, who had opposed the three-fifths clause and other concessions to slavery, offered conciliatory remarks. Roger Sherman of Connecticut declared that "it was better to let the S. States import slaves than to part with them if they made that a *sine qua non*." When the voting came, this verbal support translated into political support.

On August 25, the Convention debated a clause restraining Congress from prohibiting the slave trade until 1800. Charles Cotesworth Pinckney proposed the date be changed to 1808. Madison protested that "twenty years will produce all the mischief that can be apprehended from the liberty to import slaves." Three middle states, New Jersey, Pennsylvania, and Delaware, as well as Virginia, opposed preventing Congress from restricting the slave trade. Delegates from these states were in effect willing to call South Carolina's bluff. They knew that South Carolina was strongly in favor of a new government. They knew that Georgians were desperate for a strong national government to protect their state from the Spanish and from Native Americans. But while the Middle States and Virginia all opposed the slave trade, the Deep South, Maryland, and the three New England states all voted for it. If the compromise over representation was the "Great Compromise," then it is fair to label this one the "Dirty Compromise" of the Federal Convention. New England supported the Deep South's demand for the slave trade not to ensure acceptance of a new constitution but in return for southern support for northern shipping interests.

On August 28, the "Dirty Compromise" was drawn. The Convention gave final approval to the concept that all commercial regulations could be adopted in Congress by a simple majority, rather than the two-thirds majority that the South had been demanding. During the debate, Charles Cotesworth Pinckney noted that he supported the simple majority because of the "liberal conduct" of the New England states "towards the view of South Carolina." In the margins of his notes, Madison observed that Pinckney

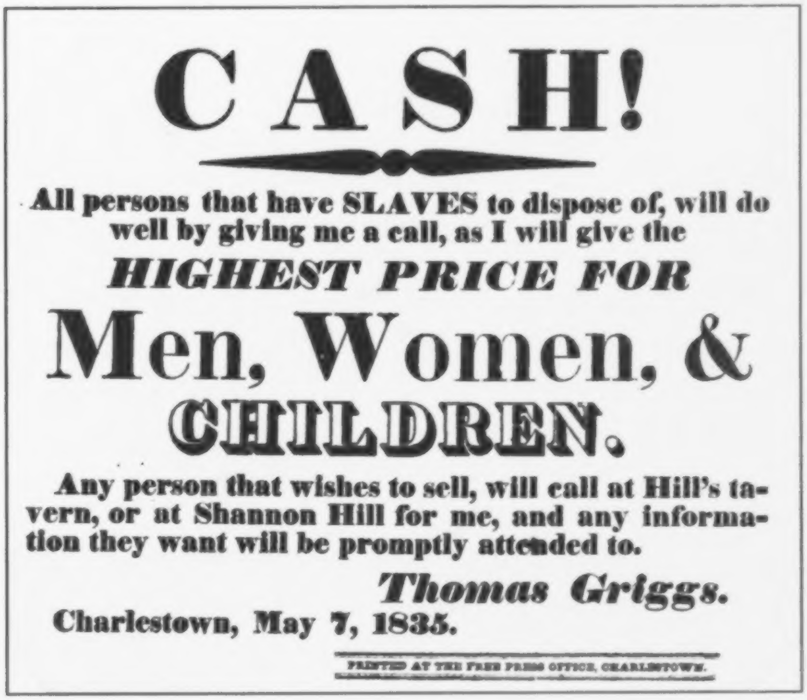
> meant the permission to import slaves. An understanding on the two subjects of *navigation* and *slavery*, had taken place between those parts of the Union, which explains the vote on the Motion depending, as well as the language of Genl. Pinkney and others.

Thus, while he thought that the interests of the South and the North were "as different as the interests of Russia and Turkey," South Carolina's Pierce Butler also supported a simple majority for commercial legislation. When the motion came to a vote, South Carolina joined the North in supporting it.

Immediately after this vote, Pierce Butler introduced the fugitive slave clause, which was accepted without debate or formal vote. The "compromise" was now complete. The Deep South got an extension of the slave trade until at least 1808 and the fugitive slave clause. The Northeast gained its cherished goal giving Congress a simple majority to pass commercial legislation.

In one sense, this compromise was as critical as the "Great Compromise" that gave equality to the states in the Senate and representation by population in the House. The Philadelphia meeting had grown out of the Annapolis Convention, which had been called to mediate commercial conflicts between the states. The compromise of August 28 allowed the new Congress to pass commercial regulations with ease. The cost of that power was high. First, the Convention agreed to protect the slave trade for at least twenty years. In 1787 no one could know that the trade would then be abolished. For the delegates in Philadelphia, and the people in the states who would elect ratification conventions, there was no guarantee that Congress would ever end the trade. For the eighty thousand or more Africans brought to America between 1788 and 1808, it was certainly of little consequence that the trade would later come to an end.

In addition to the continuation of the trade, the Compromise included the fugitive slave clause. The slave states demanded the clause late in the Convention, after the compromises over the slave trade and commerce had already been worked



CASH!

All persons that have SLAVES to dispose of, will do well by giving me a call, as I will give the

HIGHEST PRICE FOR

Men, Women, &

CHILDREN.

Any person that wishes to sell, will call at Hill's tavern, or at Shannon Hill for me, and any information they want will be promptly attended to.

Thomas Griggs.

Charlestown, May 7, 1835.

PRINTED AT THE FREE PRESS OFFICE, CHARLESTOWN.

Broadside, 1835. Library of Congress.

out. The South made the demand for this clause but offered nothing in return. While a few northerners protested, the majority of northern delegates lacked the will or the energy to fight it.

Slavery and the Constitution

The word "slavery" appears in only one place in the Constitution: in the Thirteenth Amendment, added in 1865, where the institution is abolished. The presence of slavery, however, is felt everywhere in the original document.

Slavery was directly at issue in five places in the Constitution: the three-fifths clause (Art. I, Sec. 2); the slave importation clause (Art. I, Sec. 9, Par. 1); the capitation tax clause (Art. I, Sec. 9, Par. 4); the fugitive slave clause (Art. IV, Sec. 2, Par. 3); and Article V, prohibiting any amendment of the slave trade and capitation tax clauses before 1808.

These provisions increased the representation in Congress for the slave states by adding three-fifths of the number of slaves to the total free population when determining the size of each state's congression delegation. Because the Electoral College was based on representation in Congress, this clause also increased the influence of the slave states in choosing a president. At the same time, these clauses limited the amount of taxes slaveowners would have to pay if a population-based tax, or capitation tax, were ever levied. In addition, these clauses guaranteed the existence of the African slave trade until at least 1808, and they insured that masters would have a legal right to capture their runaway slaves. These clauses protected the South's peculiar institution and, in the three-fifths clause, gave it the extra political muscle with which to guarantee the persistence of that protection.

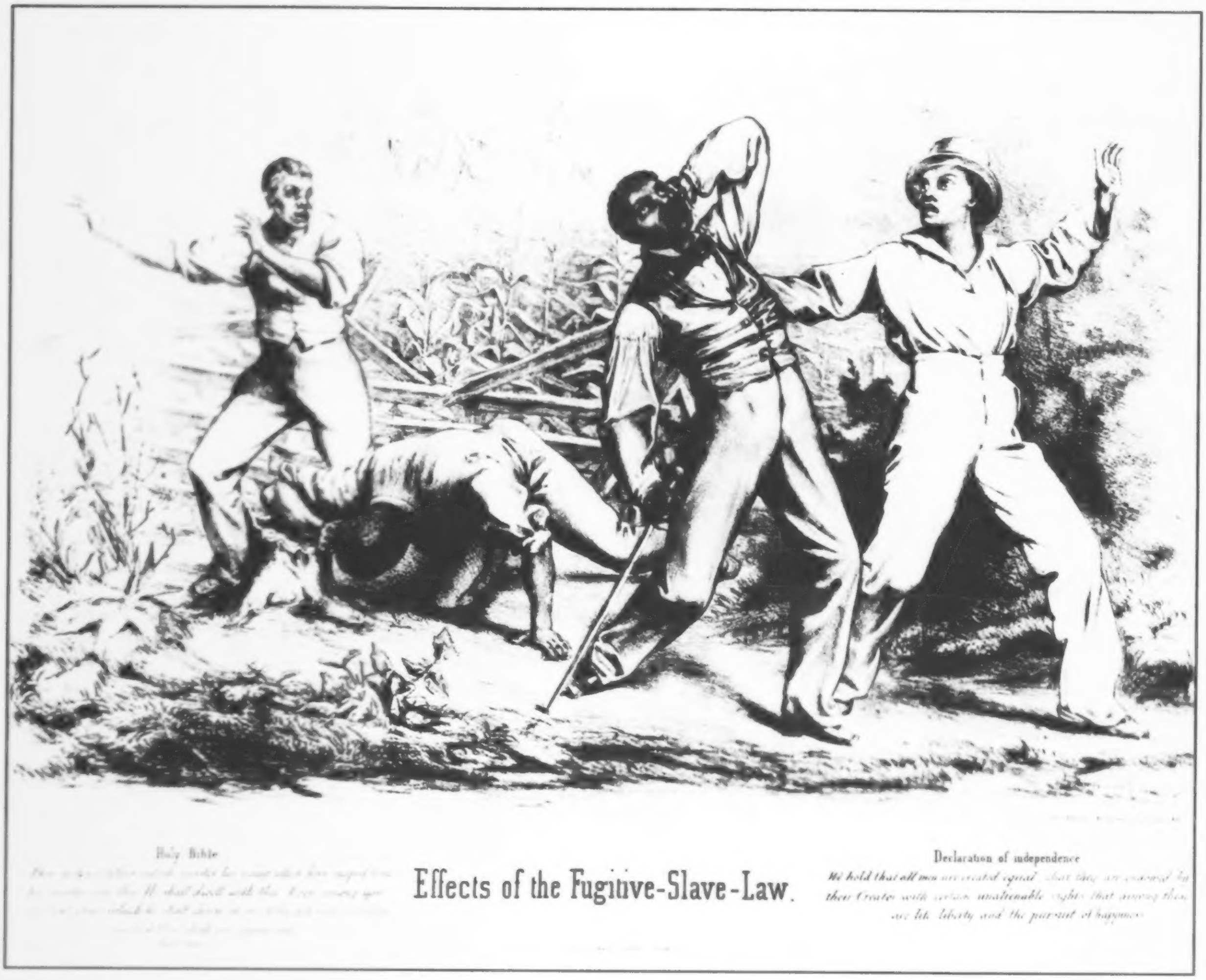
Other parts of the Constitution indirectly preserved slavery. The prohibition on export taxes (Art. I, Secs. 9 and 10) meant that commerce in the staple products of slave labor—such as tobacco, rice, and later cotton—could not be taxed. The South would thus add less to the national treasury than the North, even though it might produce more wealth. These clauses were particularly important to slaveowners at the Convention because they believed that through export duties the national government, or the free states, could indirectly tax slavery itself. Southerners thought that without such a prohibition states involved with European trade, like New York and Pennsylvania, would impose export taxes on southern tobacco and rice leaving their ports and thus undermine the slave economy. The South also feared that a Congress dominated by the North might pass national taxes on its exports.

While the South resisted taxes that might affect its products more than the products of the North, the South nevertheless expected more protection from the national government than the North did. Southerners viewed the insurrection clause (Art. I, Sec. 8), and the domestic violence clause (Art. IV, Sec. 4) with great favor. Twice in the antebellum period—during the Nat Turner Rebellion and the John Brown raid—Virginia would welcome federal troops for such suppression of a slave insurrection and an abolitionist "invasion."

When they needed the federal government's aid, slaveowners could almost always expect a sympathetic president. The structure for the Electoral College insured this. By incorporating the three-fifths clause into the Electoral College the South gained a disproportionate say in who was elected president. It is perhaps not surprising that between 1788 and 1860 nine out of fifteen presidents were slaveowners. More impressive, perhaps, is the fact that all five of the two-term antebellum presidents were slaveowners. Between 1789 and 1861, a slaveowner held the office of chief executive for all but twenty-two years.

The Constitution was a conservative document; changing it required three-quarters of the states. By the time of the Civil War, slave states still made up almost half of the Union and they could easily block an unwanted amendment to the Constitution.

Many northerners opposed ratifi-


Holy Bible
Effects of the Fugitive-Slave-Law.
Declaration of independence
We hold that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness

Drawing, 1850. Library of Congress.

cation because of the slave trade clause. New Hampshire's Joshua Atherton complained that the Constitution would make people in his state "*consenters to*, and *partakers in* the sin and guilt of this abominable traffic." In the nineteenth century, the fugitive slave clause would similarly demand that northerners partake in the sin of slaveholding as slavecatchers. But even during ratification that concept was evident to perceptive observers. In 1788 three Massachusetts Anti-Federalists predicted that "this lust for slavery, [was] portentous of much evil in America, for the cry of innocent blood . . . hath undoubtedly reached to the Heavens, to which that cry is always directed, and will draw down upon them vengeance adequate to the enormity of the crime." The events of 1861–65 would prove the three Massachusetts men correct. Only after four years of unparalleled bloodshed could the Union be made "more perfect" by finally expunging slavery from the Constitution.

For southerners, however, one of the great virtues of the document produced in 1787 was the protection it gave to slavery under the new national government. Edmund Randolph told the Virginia ratifying convention that in Philadelphia "*even South Carolina herself conceived this property [slavery] to be secure.*" [Emphasis in the original.] General Charles Cotesworth Pinckney, one of the delegates from South Carolina, would have agreed. He boasted: "In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad."

Suggested additional reading:

Richard Beeman, *et al.*, eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (1987).

Lynd, Staughton, *Class Conflict, Slavery, and the United States Constitution* (1967).

Robinson, Donald, *Slavery in the Structure of American Politics, 1765–1820* (1971).

Wiecek, William M. *The Sources of Antislavery Constitutionalism in America, 1760–1848* (1977).

Paul Finkelman is a member of the history department at the State University of New York at Binghamton. He is the author of *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: Univ. of North Carolina Press, 1981) and the editor of *Slavery, Race and the American Legal System, 1700–1872* 15 vols. (New York: Garland Press, 1987). He is currently writing a history of the enforcement of the fugitive slave laws and *A History of American Constitutional Politics*, sponsored by the Organization of American Historians.

Constitutional Equality

by STANLEY N. KATZ

Most Americans remember Jefferson's dictum that "all men are created equal." Many of us believe that it is part of the United States Constitution. The hard fact is, of course that the word "equality" appears only once in the 1787 document, and it does not apply to citizens.

Not many lawyers, much less law students or concerned citizens, can find the single reference to "equality" in the text of the original Constitution. Surprisingly, it is in Article V, the amendment article, which defines the two unamendable clauses of the Constitution: the slave trade clause and that governing the representation of states in the Senate. Constitutional equality, as expressed literally in the text fashioned by the framers, was no more than equal representation for all states in the upper house of the national legislature: "[N]o state, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Why is there no reference to equality for individuals in the body of the Constitution? Perhaps the harder question is why the Bill of Rights did not guarantee equality, since the first ten amendments specified other individual rights which are at best only implied in the original Constitution. Yet neither the word nor the concept of "equality" appears in the Bill of Rights, unless by implication in the rights reserved "to the people" in the Ninth Amendment, or, for some people and under certain circumstances, in the First Amendment or in the Due Process Clause of the Fifth Amendment.

The Spirit of '87

The fact of the matter is that it would be very surprising if equality were mentioned, much less guaranteed, in the 1787 document. The Declaration of Independence, from which Jefferson's statement comes, differed from the 1787 constitution in two important ways: (1) the Declaration was the product of a revolutionary tradition, promulgated at the very peak of American ideological fervor, and (2) it was a political manifesto, designed to rally domestic and foreign support of the revolutionary cause rather than to serve as a framework document for governmental organization.

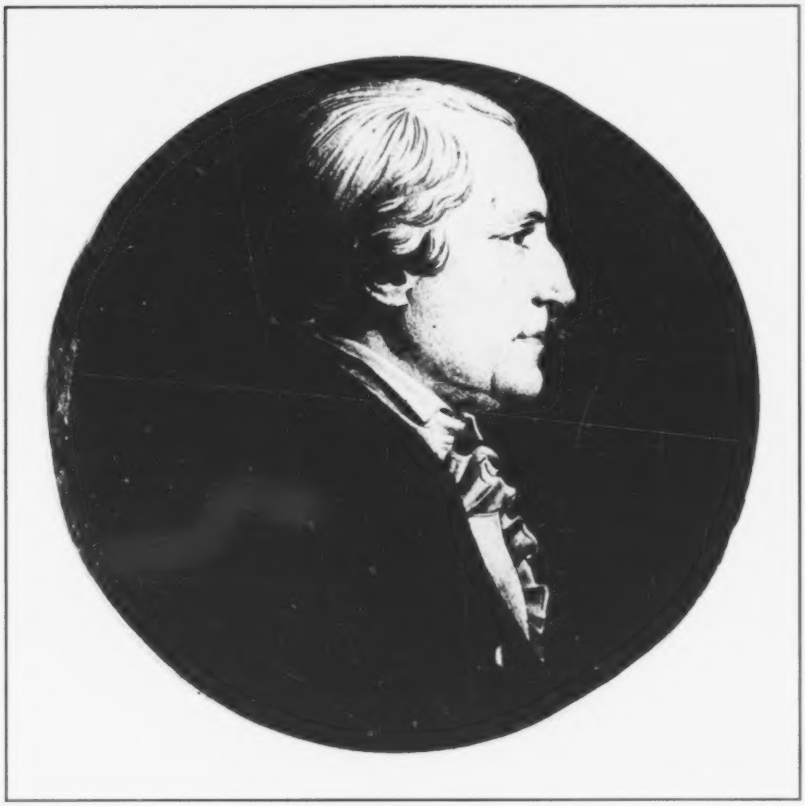
Progressive historians, following Carl Becker and Merrill Jensen, have long argued that the political thrust of the revolutionary movement was democratic. The Revolution was thus properly institutionalized in the Articles of Confederation format, which severely limited the power of the central government and tended to favor the social distribution of political power. From this perspective, the movement for the Philadelphia Constitution was reactionary, since the more highly centralized 1787 governmental structure could be used by a merchant minority for its own purposes, contrary to the will of the majority. For the Progressives, then, the exclusion of equality as a formal constitutional value in 1787 seems historically predictable. But even those historians who do not consider the Constitution to be a counterrevolutionary document must acknowledge that the ideological thrust of 1787 was different from and certainly less egalitarian than that of 1776.

The spirit of '76 was republican. It held up for emulation the Jeffersonian conception of a community of independent, self-reliant, property owning farmers tied together by their commitment to place the good of the community before their individual self-interest. Republicanism thus implied the ultimate goal of equality among those productive workers in the political community (a definition which by no means included a demographic majority). Most historians now argue that important elements of this republican ideology persisted well into the nineteenth century.

Liberalism

But, as Joyce Appleby has reminded us, liberal ideology began to play a role in American political thought in the late eighteenth century. Liberalism contended that social good was achieved through the cumulation of the pursuit of individual self-interest. Liberalism thus implies a different sort of equality, one measured at the "front end" as individual opportunity and perceived as a starting point rather than a social goal. The tension between republicanism and liberalism was apparent in 1787–1788, but the fact is that neither ideology required a commitment to general social equality or egalitarianism. Both, for different reasons, required guarantees of participation for those entitled to membership in the political community. And both accommodated themselves to the reality that not all Americans were entitled to be political actors.

Slavery, the "peculiar institution," was only the most obvious reason why the framers could not (or would not) write equality into the United States Constitution. How could the Constitution advert to equality as a general value when nearly one in every five "Americans" was enslaved? The subject of slavery was so politically sensitive that the framers omitted any overt reference to it. To state the obvious, if some people were to count as three-fifths of a person for the purpose of calculating representation in the lower house, how could



Justice St. George Tucker of Virginia. ***Library of Congress.***

equality be a constitutional norm?

But the case against equality does not need to rest on the tragedy of slavery. Americans in 1787 never proclaimed themselves in favor of the sweeping egalitarianism announced six years later in France. Our society was based upon systematic inequality, about which there was not much dissent. Women did not hold a legal or political status equal to that of men, nor did Indians or free blacks claim equality with whites. The society (differentiated from state to state and region to region), was based on the recognition of a hierarchy of statuses rather than a conception of universality of rights, the Declaration of Independence notwithstanding. Some Americans aspired to more in 1776, but the Federalist triumph in 1787–88 constituted a victory for social realism and the acceptance of federal constitutional inequality, or at best equality only for that minority of Americans defined as being within the political community.

An 1806 law suit in Virginia, *Hudgins* v. *Wrights*, will perhaps make the point. A few years earlier, Chancellor George Wythe had freed a young woman claiming to be an Indian from the ownership of a slaveholder who alleged that she was black. The law of Virginia then presumed Indians to be free unless proven otherwise, and blacks to be slaves unless proven free. Wythe went further, however, and announced that Virginia's 1776 Declaration of Rights, which declared all men to be free and equal, was in itself a constitutional guarantee of the presumption of freedom and equality. When the case was appealed to Virginia's Supreme Court, however, Justice St. George Tucker scathingly rejected Wythe's argument for egalitarianism. Virginia Declaration, said Tucker, was

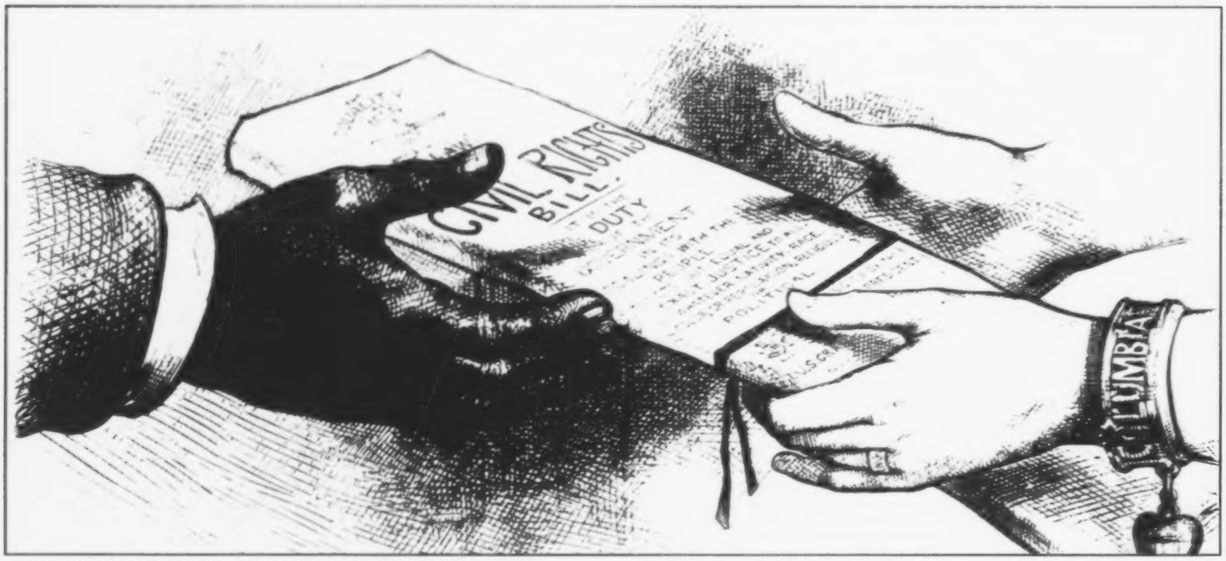
> notoriously framed with a cautious eye to this subject [slavery], and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no concern, agency or interest.

In Virginia, as in the United States generally, few people thought that revolutionary prescription of equality had general constitutional implications.

Locke had spoken of life, liberty, and property (which Jefferson translated as "life, liberty and the pursuit of happiness"), and property, rather than equality, was explicitly protected in the Constitution of 1787–91 through, for example, the clauses prohibiting states from issuing paper money or impairing the obligation of contracts. The protection of private property was essential to nationalists interested in economic development through private enterprise. But the notion that some measure of equality of economic opportunity was necessary to civil liberty did not imply, for most Americans, that equality was similarly requisite to political liberty. Voting qualifications set by the states for the first federal election in 1788 testified to the prevailing view that only men of property had the kind of stake in government that entitled them to participate in it.

The federal constitutional solution at the founding held sway for nearly three quarters of a century, although some states moved in a more egalitarian constitutional direction. Meanwhile, the nation grew in dramatic and unexpected ways, and both its growth and practices, such as the creation of political parties and the emergence of judicial review, altered the constitutional system significantly. A number of systemic failures also began to emerge, but none so terrifying and nearly mortal as the inability to cope with the intertwined problems of slavery and regionalism.

The solution to these problems was forged in the cataclysm of the



Harper's Weekly, 1875. Smithsonian Institution, Washington, D.C.

Civil War and Reconstruction. We must nevertheless acknowledge the failure of constitutional change as a response to the antebellum crisis. Constitutionalism could do little better than Chief Justice Roger Taney's dictum in the Dred Scott case (1857) that "the negro has no rights which a white man is bound to respect." The point is not so much that the Supreme Court could not manage a statesmanlike response to the conflict (although that is true) as that the entire constitutional system could not produce a politically acceptable consensus upon which a democratic solution could be based.

Ironically, this devastating constitutional failure came at precisely the moment that political equality for white men had succeeded as the decisive political value. The franchise had been expanded, legal protections were extended to some new groups, and general legislation began to replace special interest statutes. The Jacksonian attack on monopoly also moved governments in a more egalitarian direction. Some of this movement occurred in national politics, but it would be left to the new Republican party, with its program of "free soil, free labor and free men," to work out a liberal (though certainly not republican) federal constitutional regime for the postbellum United States.

The Fourteenth Amendment

It was only with the ratification of the Fourteenth Amendment in July 1868 that egalitarian values explicitly entered the Constitution. Section 1 of the amendment, in its final clause, forbade the several states to "deny to any person within [their] jurisdiction the equal protection of the laws." Notice two things in the language: (1) "equal protection of the laws" rather than "equality" is guaranteed by the clause, and (2) this protection is afforded only against nonegalitarian activities of the states. To this day there is no explicit constitutional guarantee against comparable incursions of the federal government, although in *Bolling* v. *Sharpe* (1954), the decision that desegregated the District of Columbia public schools, the Supreme Court found that the due process clause of the Fifth Amendment included a requirement of equal protection.

Perhaps more important, most of the framers (and ratifiers) of the Fourteenth Amendment pretty clearly intended the Equal Protection clause to cover what they called "civil" (rather than political or social) rights. These were the rather narrow legal rights specified by the 1866 Civil Rights Act: the right to own property, the right of contract, the right to testify in court, and the like. Civil rights were specifically designed to confer upon the freed slaves the capacity to participate in the liberal society into which they had so suddenly been thrust. Neither Abraham Lincoln nor any but the most radical abolitionists imagined full social integration as a plausible political goal. Lincoln himself opposed both black suffrage, and "everything looking to placing negroes upon a footing of political and social equality with whites" although he defended for them "a perfect equality of civil and personal rights under the Constitution." The road from constitutional "equal protection" to full individual equality has not yet been completed, though there is no doubt that the first stones were put in place from 1866 to 1868.

While Congress attempted to provide a somewhat broader conception of civil rights (and therefore, to some extent, of equality) in the 1875 Civil Rights Act, for nearly a century the history of constitutional equality was written by the Supreme Court. The story is a mean-spirited one, for the court contracted the scope of the equal protection clause in several ways. First, it developed a constitutional doctrine of "state action" that required a showing of overt and official activity on the part of public officials as a trigger mechanism for equal protection complaints. The amendment had, to be sure, forbidden any "State" to "deny to any person within its jurisdiction the equal protection of the laws," but its sparse language did not specify that the denial had to be overt rather than passive, direct rather than indirect. Second, the Court determined that the protection of "persons" in the clause comprised

It was only with the ratification of the Fourteenth Amendment in July 1868 that egalitarian values explicitly entered the Constitution.

all conceivable legal persons, including those fictive legal persons known as business corporations. The cumulative result of this jurisprudence was a narrowing of the scope of protection for human beings and an expansion of scope for the protection of business activity. The enunciation of these doctrines in the *Slaughterhouse Cases* (1873) and the *Civil Rights Cases* (1883) dramatically limited the potential constitutional equality for individuals, even the freedmen who were the intended beneficiaries of the Fourteenth Amendment.

Plessy & Brown

This counter-egalitarian judicial trend reached its fulfillment with the Court's 1896 decision in *Plessy* v. *Ferguson*, holding that Louisiana's legislative policy of racial segregation in public transportation did not violate the equal protection clause. Here was an instance of self-evident "state" action appearing to deny equality of treatment to blacks, which the Court justified by accepting the argument that comparable accommodations, however separate, were constitutionally "equal." For the Supreme Court at the century's end, "equal" had become synonymous with "equivalent." The *Plessy* reasoning was subsequently invoked to constitutionalize racial segregation (Asian as well as black) in public education, politics, and practically everywhere else in southern public life (*Gong Lum* v. *Rice*, 1927).

Although some cases hinted at the potential egalitarian scope of the equal protection clause, constitutional guarantees of equality remained limited throughout the first four decades of the twentieth century. Equal protection, scoffed Oliver Wendell Holmes, was the "usual last resort of constitutional arguments" (*Buck* v. *Bell*, 1927). The low point of equal protection came, in fact, when the Supreme Court, deferring to an alleged national security claim, refused constitutional protection to the Japanese American citizens interned in 1942.

From 1868 until 1954, constitutional equality meant at most nominally fair legislative classification and statutory application. Statutes necessarily sort individuals into groups; the equal protection doctrine served at least to limit the potential arbitrariness of such state classifications. But the force of the principle was weakened by judicial deference to state justification of apparently inequitable classifications, and, in matters of race, by the Supreme Court's reluctance to reexamine the *Plessy* doctrine (that is, its substitution of equivalence for equality). Individual equality was at best a weak constitutional value in postbellum America.

Substantive equality (the notion that everyone is entitled to equal treatment in all aspects of life) began to enter the Constitution in 1954. The decision of the Court in *Brown* v. *Board of Education of Topeka*, proclaiming that state-decreed racial segregation of public schools violated the Fourteenth Amendment principle of equal protection of the laws, began a constitutional as well as a social revolution. *Brown* carefully avoided reversing *Plessy* by confining the reasoning only to public education. But it is obvious that the Warren Court must have found a stronger reading of equality in the Fourteenth Amendment than had the Brewer Court in 1896. "Separate" can only be "equal" if the concept of equality is narrow. After 1954, in cases dealing with many activities other than education, the Supreme Court began to define the content of the new equality.

Race was of course the major substantive component in the Warren Court's reinterpretation of constitutional equality. The Court declared that race was meaningfully a "suspect" legislative category (following up the abortive hint in *Korematsu*), subject to judicial "strict scrutiny." What this meant in practice was that state schemes employing race or other suspect classifications would not enjoy the presumption of constitutionality traditionally accorded state actions. Rather, such schemes would have to be justified by showing that they were necessary to achieve fundamental state purposes, that they did not violate "fundamental rights and interests," and that they could be accomplished in no less onerous a manner. The tables were thus turned, for previously state programs were given the benefit of the constitutional doubt and were upheld unless blatantly unrelated to legitimate public ends.

This infusion of political and social substance into constitutional equality was probably the most important aspect of the "revolution" in constitutional law begun by the Warren Court. The process continued, for the most part, under the Burger Court, with the result that for almost thirty years after the *Brown* decision new categories of equality gained constitutional protection, in whole or in part. Alienage, ethnic origin, and illegitimacy perhaps gained the most, but progress was also made against gender and wealth discrimination. Equality emerged as a normative standard in the constitutional evaluation of political representation ("one person, one vote"), the rights of defendants in criminal proceedings, and the right of interstate travel. This trend was given enormous velocity by Congress, with the passage of the Civil Rights Acts of 1957, 1960,

Confrontation between Nicholas Katzenbach of the United States Department of Justice and Governor George Wallace over integrating the University of Alabama, September 11, 1963. Library of Congress.

1964, 1965, and 1968. Civil rights now took on a richer range of meaning, extending to employment, public accommodation, education, and many other significant realms of public activity. Age, gender and other previously discriminated against categories of the American population were specifically "included in" by the new legislation. For Americans coming of age since the Warren Revolution, equality had become an operative, meaningful public value.

Containment

By the time of Warren Burger's retirement from the chief justiceship in 1986, the Supreme Court had gone far toward the fulfillment of the promise of constitutional equality, but the Court had also stopped short in a number of important areas. Above all, the number of "suspect" categories did not expand. Many had hoped (or feared) that gender would be included, but the Court drew back from this step in *Frontiero* v. *Richardson* (1973). There were some early indications that wealth discrimination might also enter the charmed circle, but that too was not to be. Welfare benefits, exclusionary zoning, municipal services, and school finance failed to receive even the "heightened scrutiny" applied to gender discrimination which would have made them subject to more stringent tests of equality.

Archibald Cox has remarked that "Once loosed, the idea of Equality is not easily cabined." That conclusion seemed persuasive during the years of the Warren Court, but it now appears that federal constitutional equality has been contained, if not diminished. Once the Court moved beyond the fulfillment of the promise of racial equality, it had no clear sense of where and how far to take the concept. The belief that further development ought to rest with the legislature is doubtless prudent, but it also shows how incomplete the American constitutional notion of equality is as we approach the twenty-first century.

At the moment, equality seems most likely to remerge as the framework for political conflict in the United States. As Rousseau once noted: "This equality, they say, is a chimerical speculation which cannot exist in practice. But . . . [it] is precisely because the force of things always tends to destroy equality that the force of legislation must tend to maintain it." We will see how important equality is to Americans in the next century. They cannot assume that it has been guaranteed them by their constitutional heritage.

Stanley N. Katz is the president of the American Council of Learned Societies and a senior fellow of the Woodrow Wilson School at Princeton University. He is the author of "The American Constitution: A Revolutionary Interpretation," in Richard Beeman, Stephen Botein and Edward C. Carter, II, *Beyond Confederation: Origins of the Constitution and American National Identity* (1987).

DOCUMENTS

The Bill of Rights: The Roger Sherman Draft

by JAMES H. HUTSON

In the summer of 1987, archivists at the Library of Congress verified a draft of the Bill of Rights written by Roger Sherman, a delegate to the First Congress from Connecticut. Better known to most twentieth-century Americans as the author of the Connecticut Compromise at the Constitutional Convention, Sherman was appointed by the House of Representatives on July 21, 1789 to the select committee "to take the subject of amendments to the Constitution of the United States generally into [its] consideration." The amendments referred to were those recommended by the states during the contest for ratification of the Constitution.

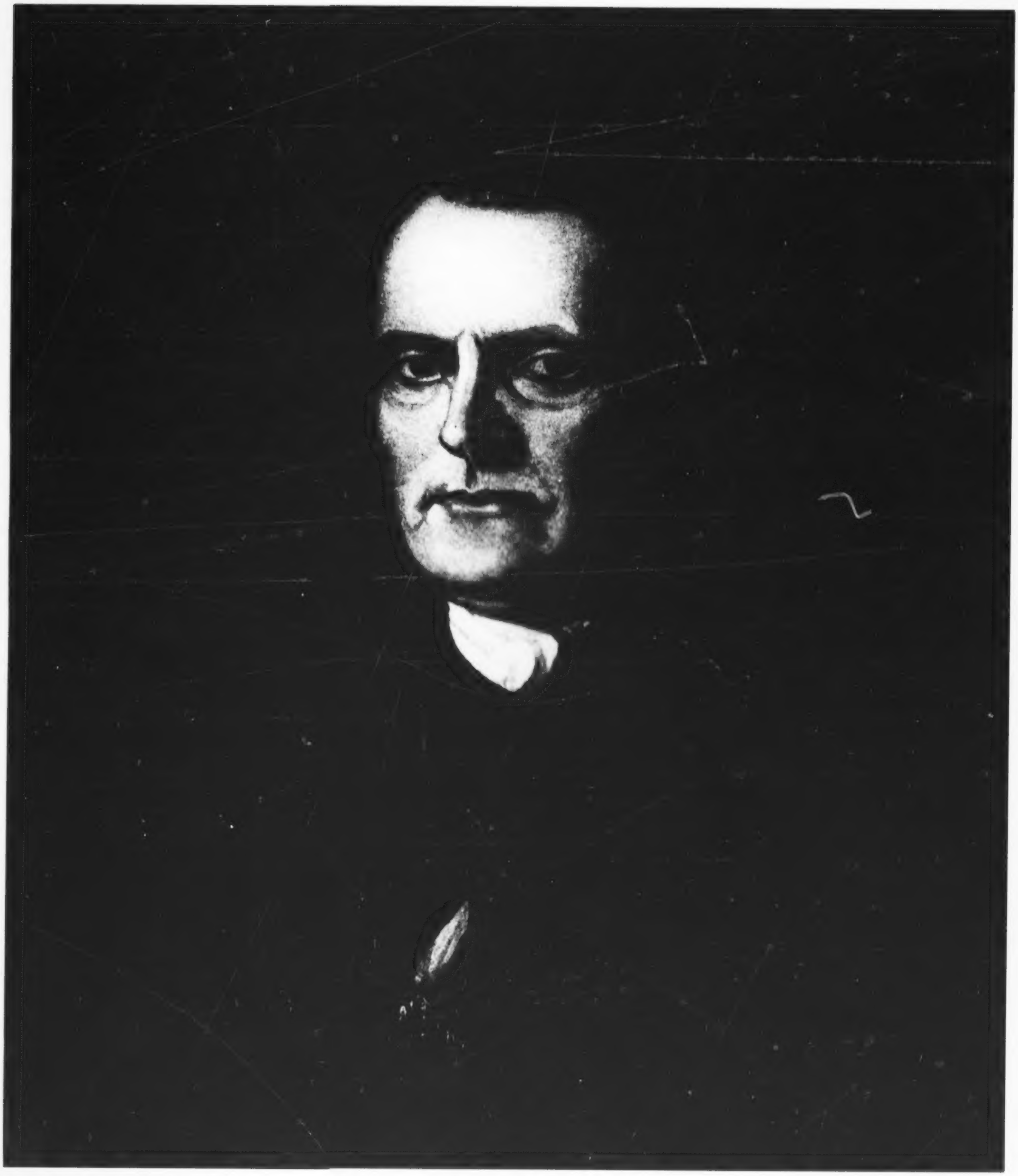
Sherman's proposal contradicts the received wisdom that he was an inveterate foe of any bill of rights, an impression created by the Annals of Congress, an 1834 reprinting of the unreliable shorthand reports of one Thomas Lloyd, the incompetent, often inebriated stenographer who was supposed to have been recording the discussions in the House of Representatives. What Sherman actually opposed, however, was Madison's efforts to incorporate amendments into the body of the Constitution rather than append them as a group at the end of the document. "We ought not to interweave our propositions into the work itself," he informed the House on August 13, "because it will be destructive of the whole fabric." Sherman's draft appears to have been an effort to demonstrate how a bill of rights could be written as a coherent entity for addition to the Constitution.

Far from opposing Madison on the substance of a bill of rights, Sherman included in his draft many of the provisions contained in Madison's speech of June 8, introducing to Congress the subject of a bill of rights; in places, he borrowed Madison's exact language. Although Sherman added some ideas of his own, his draft was, in fact, an effort to condense and refine Madison's proposals of June 8; he was acting more as a collaborator than as an adversary. Nevertheless, on July 28 the committee adopted Madison's version.

Although it was not the committee's choice, Sherman's draft of the Bill of Rights does still shed light on "the intention of the framers." Article 2 and particularly Article 8 of Sherman's copy support Leonard Levy's thesis that the framers of the Constitution held that "freedom of the press" meant only freedom from prior restraint. Those seeking the meaning of the Second Amendment will note that in Article 5 Sherman says nothing about a right to bear arms. Most articles of Sherman's draft will, in fact, speak to such questions. The document, printed below, is in the custody of the manuscript division of the Library of Congress.

[This committee] Report as their opinion, that the following articles be proposed by Congress to the legislatures of the several states to be adopted by them as amendments of the Constitution of the United States and when ratified by the legislatures of three fourths (at least) of the said states in the union, to become a part of the Constitution of the United States pursuant to the fifth Article of the said Constitution.

1. *The powers of government being derived from the people, ought to be exercised for their benefit, and they have an inherent and unalienable right to change or amend their political constitution whenever they judge such change will advance their interest and happiness.*
2. *The people have certain natural rights which are retained by them when they enter into society, such as the rights of conscience in matters of religion; of acquiring property, and of pursuing happiness and safety; of speaking, writing and publishing their sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to government by petition or remonstrance for redress of grievances. Of these rights therefore they shall not be deprived by the government of the United States.*
3. *No person shall be tried for any crime whereby he may incur loss of life or any infamous punishment, without Indictment by a grand Jury, nor be convicted but by the unanimous verdict of a Petit Jury of good and lawful men freeholders of the vicinage or district where the trial shall be had.*
4. *After a census shall be taken, each state shall be allowed one representative for every thirty thousand Inhabitants of the description in the second section of the first Article of the Constitution, until the whole number of representatives shall amount to   but never exceed*
5. *The militia shall be under the government of the laws of the respective states, when not in the actual service of the United States but such rules as may be prescribed by Congress for their uniform organization and discipline shall be observed in officering and training them; but military service shall not be required of persons religiously scrupulous of bearing arms.*
6. *No soldier shall be quartered in any private house in time of Peace, nor at any time, but by authority of law.*
7. *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted in any case.*
8. *Congress shall not have power to grant any monopoly or exclusive advantages of commerce to any person or company; nor to restrain the liberty of the Press.*
9. *In suits at common law in courts acting under the authority of the United States, issues of fact shall be tried by a Jury if either party request it.*
10. *No law that shall be passed for fixing a compensation for the members of Congress except the first shall take effect until after the next election of representatives posterior*



Roger Sherman, *painting by Thomas Hicks after Ralph Earl. Independence National Historical Park, Philadelphia, PA.*

to the passing such law.

11. *The legislative, executive and judiciary powers vested by the Constitution in the respective branches of the Government of the United States shall be exercised according to the distribution therein made, so that neither of said branches shall assume or exercise any of the powers peculiar to either of the other branches.*

And the powers not delegated to the government of the United States by the Constitution, nor prohibited by it to the particular States are retained by the states respectively, nor shall any the exercise of power by the government of the United States particular instances herein enumerated by way of caution be construed to imply the contrary [sic].

John Marshall and the Contract Clause

by CHARLES F. HOBSON

Among those who belonged to the founding generation, no one did more to shape the constitutional development of the United States during its formative period than John Marshall. As fourth chief justice of the United States from 1801 to 1835, he delivered a series of notable opinions, beginning with *Marbury* v. *Madison* (1803) and including *Fletcher* v. *Peck* (1810), *Dartmouth College* v. *Woodward* (1819), *McCulloch* v. *Maryland* (1819), *Cohens* v. *Virginia* (1821), and *Gibbons* v. *Ogden* (1824). Together his constitutional pronouncements strove to give full effect to the federal powers granted by the Constitution and to the restraints and prohibitions imposed on the state governments. Under his leadership, the judiciary, which might well have remained a subordinate institution, began to acquire the power and status it enjoys today of a fully coordinate branch of government.

Probably the most widely known of Marshall's decisions is *Marbury* v. *Madison*, in which the Supreme Court first asserted its power to declare unconstitutional an act of Congress. For all the attention it has received as a precedent for the court's power of judicial review, this case nevertheless stands apart from the dominant theme of Marshall's constitutional jurisprudence. Not until 1857 (in *Dred Scott* v. *Sandford*) would the Court again strike down a law of Congress. Before the Civil War, judicial review was exercised almost exclusively against *state* laws, a power resting on reasonably solid textual ground — the prohibitions on the states recited in Article I, section 10, together with the clause of Article 6 declaring "the Constitution, laws, and treaties of the United States to be the Supreme Law of the Land."

Six Notable Opinions of John Marshall

Marbury v. ***Madison*** (1803): The first occasion in which the Supreme Court declared an act of Congress to be unconstitutional. (The law in question gave the Supreme Court original jurisdiction where the Constitution said it should have appellate jurisdiction.)

Fletcher v. ***Peck*** (1810): The Court for the first time invalidated a state law as contrary to the Constitution. (The ruling defined a land grant by a state legislature as a "contract" protected by the Constitution.)

Dartmouth College v. ***Woodward*** (1819). The Court further extended the meaning of "contract" to embrace corporate charters, according them constitutional protection against legislative infringement.

McCulloch v. ***Maryland*** (1819): Upholding the power of Congress to charter a national bank, Marshall on behalf of the Court made an eloquent statement of the theory of national supremacy while expounding the doctrine of broad construction and implied powers.

Cohens v. ***Virginia*** (1821): Marshall forcefully restated the theory of national supremacy while asserting a broad view of the jurisdiction of the federal courts, which included appellate jurisdiction over the state courts when federal questions were involved.

Gibbons v. ***Ogden*** (1824): The Court first expounded Congress' power to regulate interstate commerce under the "commerce clause." Marshall again asserted a broad view of congressional power, emphatically rejecting the doctrine of strict construction.

The Text of the Constitution

The first paragraph of Article I, section 10, among other things, declares that no state shall "emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts." These clauses of the Constitution spoke directly to the framers' overriding concern to protect private rights — most importantly, the rights of property — from infringement by the states. Advocates of constitutional reform had loudly complained of obnoxious and dangerous laws that rendered property insecure and undermined commercial stability. Such laws, they came to realize, were the bitter fruits of unchecked majority rule in the state legislatures.

Of the prohibitions against the states mentioned in the Constitution, that against impairing the obligation of contracts supplied the Marshall Court with its principal weapon for invalidating state laws. To Marshall the contract clause epitomized the tenor and spirit of the Constitution. In his mind, the true character of the fundamental charter lay less in its grant of powers to the federal government than in its abridgment of the powers of the state governments. The federal government, possessing enumerated powers only, was by definition limited. Before the adoption of the Constitution, the state governments, conversely, possessed plenary powers except as restricted by their constitutions (which in practice had proved to be ineffective restraints). The Constitution, as Marshall read it, transformed the states into limited governments as well — limited both in relation to the federal government and, more importantly, in relation to their individual citizens.

During the Marshall era, the contract clause became for all practical purposes a general restraint against state interference with property rights. Although security for these rights was obviously a primary objective of the framers, few in 1787 could have predicted so large a role for the contract clause in the constitutional law of the new nation. The immediate forerunner of the clause was the second article of the Northwest Ordinance, also adopted in the summer of 1787, which read in part: "And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed." On August 28, Rufus King moved to add these words of the ordinance to the proposed Constitution, but after a brief discussion a substitute motion prohibiting the states to pass ex post facto laws was approved. When the Committee of Style reported on September 12, however, "laws altering or impairing the obligation of contracts" had been added to the prohibitions, probably in response to John Dickinson's observation (taken from Blackstone) that "ex post facto" referred only to criminal cases. After striking out "altering," the Convention adopted the contract clause on September 14, 1787.

Neither the Convention debates nor the debates of the state ratifying conventions shed much light on the intention behind the contract clause. Was it to apply only to private contracts between individuals, "*bona fide*, and without fraud, previously formed," in the language of the Northwest Ordinance? If that wording had been adopted, it is difficult to conceive how Marshall could have used the clause as the basis for the decisions in *Fletcher* v. *Peck* or *Dartmouth College* v. *Woodward*. As finally approved, the prohibition is expressed in general terms. Did the omission of the more detailed wording of the Northwest Ordinance signify an intent to broaden the scope of the contract clause? The record is too scanty and inconclusive. Among the handful who uttered any thoughts on this point, the prevailing assumption appears to have been that the clause would embrace private contracts.

The text of the Constitution makes clear the intention to forbid the states from enacting three types of laws they had been in the habit of passing in the 1780s: paper-money laws, which made paper bills issued on the credit of the state ("bills of credit") a circulating medium and usually a legal tender in payment of debts; "tender" laws, which enabled debtors to satisfy executions for debt by tendering specific property at a valuation higher than its market value; and "stay" and "installment" laws, by which executions for debt were either postponed or were levied in installments. It was these laws the framers had in mind when they condemned violations of the obligation of contracts. Since other clauses of Article I, section 10, prohibited paper money and tender laws, was the contract clause to be understood to prohibit stay and installment laws but no others?

John Marshall, *painting by John B. Martin. Architect of the Capitol collection. Library of Congress.*

Judicial Review

The potential of the contract clause as an instrument of judicial review was not immediately recognized by judges. Indeed, during the first generation of the Constitution, it was by no means settled that judicial review would be restricted to pronouncing laws "unconstitutional," that is, contrary to a specific provision of a written constitution. Particularly in the state courts, judges frequently declared laws invalid on the less concrete ground that they violated fundamental rights (not always explicitly spelled out in the state constitution) that were beyond the reach of legislative power. This was the doctrine of "vested rights," which enjoyed widespread acceptance among jurists of the time and became, in the words of an eminent scholar, "the basic doctrine of constitutional law."

One of the most forthright articulations of this doctrine was set forth by Justice Samuel Chase in the case of *Calder* v. *Bull* (1798). "There are acts which the federal or state legislature cannot do," wrote Chase, "without exceeding their authority. There are certain principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority."

Declaring a legislative act to be "contrary to the great first principles of the social compact" was not an altogether satisfactory justification for judges to annul it. Were judges uniquely qualified to pronounce a law void as violating "natural justice"? After all, republican legislators must be presumed to have an understanding of the "vital principles" of republican government. A law enacted after solemn deliberation and not contravening any specific provision of the Constitution should be sufficient reason for judges to accept its validity — notwithstanding they may have a different opinion as to its justice or policy. *Calder* v. *Bull* was also the occasion of an able statement of this view by Justice James Iredell: "If . . . the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest of men have differed upon the subject."

John Marshall's great achievement was to reconcile these opposing views, to base judicial review squarely on the text of the Constitution while finding in that text ample protection for vested rights. To accomplish this purpose, Marshall applied an expansive interpretation to the contract clause, fully exploiting its general language. Commentators may disagree on the soundness of his construction in particular cases, but there is no doubt that by anchoring vested rights to the Constitution Marshall made judicial review a more palatable device in a republic for reconciling the will of the majority with the ends of justice. In the United States the Constitution was *law*, and if in the regular course of adjudication a conflict appeared between that law and a legislative act, then (said the chief justice in *Marbury*) it was "emphatically the province and duty of the judicial department to say what the law is."

By virtue of judicial review, American judges were entrusted with the power to interpret and to apply the Constitution in the same way they had traditionally construed ordinary statutes. In construing statutes, they necessarily had to give due attention to the legislature's intent. Interpreting the Constitution imposed the same obligation. Throughout all his great constitutional cases, especially those arising under the contract clause, Marshall faced the problem of reconciling his reading of the Constitution with the "original intention" of its authors. He characteristically solved this problem in a way that left much to his judicial discretion. In his hands, the Constitution — "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs" (*McCulloch* v. *Maryland*, 1819) — became a flexible instrument, capable of accommodating itself to changing circumstances and conditions.

Fletcher v. *Peck*

The first occasion on which Chief Justice Marshall construed the contract clause also marked the first time the Supreme Court held a state law to be unconstitutional. This was the case of *Fletcher* v. *Peck*, decided in 1810, which grew out of the Yazoo land sales by the state of Georgia. In 1795 the Georgia legislature passed an act granting millions of acres of Yazoo lands (most of present-day Alabama and Mississippi) to several land companies. The sale was accompanied by obvious bribery, the legislators exchanging their votes for shares of stock in the companies. In response to widespread popular denunciation of the Yazoo fraud, a newly elected legislature revoked the grant the following year.

Land claims in this vast region remained embroiled in politics during the next decade. After 1797, when Georgia ceded its western lands to the United States, Yazoo became a hotly debated issue in the halls of Congress. Claimants to Yazoo lands, many of whom were third parties who had purchased in good faith, repeatedly but unsuccessfully petitioned Congress to appropriate part of the territory to satisfy their claims. Unable to obtain legislative relief, they turned to the courts for redress — a tactic that aggrieved groups have frequently adopted throughout our history. *Fletcher* v. *Peck* illustrates the peculiarly American penchant (noted by Tocqueville) of resolving political questions into judicial questions.

John Peck had purchased Yazoo lands from one of the land companies and in turn sold a tract to Robert Fletcher in 1803. Fletcher then sued Peck in the federal circuit court for recovery of the purchase price, alleging that Peck's title was unsound. After losing on circuit, Fletcher took his case to the Supreme Court, where it was argued in 1809 and again in 1810. The most important issue presented by the pleadings concerned the validity of Georgia's act rescinding the 1795 grant — also the central question in the earlier debate in Congress. In deciding this point, Marshall declined to inquire into the corrupt motives of the legislators on the ground that this matter was beyond judicial competence. He then examined the rescinding law in light of certain inherent limitations upon legislative power.

> *When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.*
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> *It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?*

Thus far Marshall seemed inclined to nullify the rescinding law on general grounds as an unwarranted legislative infringement of vested rights. Its validity, he observed, "might well be doubted, were Georgia a single sovereign power." The Court was not compelled to answer this question, however, for Georgia was part of a union of states bound by a Constitution imposing limits upon their legislatures. It remained only to inquire if this case came within the prohibition against impairing the obligation of contracts. Marshall proceeded to show that the grant of land by Georgia to the companies met the definition of a contract as set forth by Blackstone. He next considered whether the Constitution distinguished between public and private contracts.

> *If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?*
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> *The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.*
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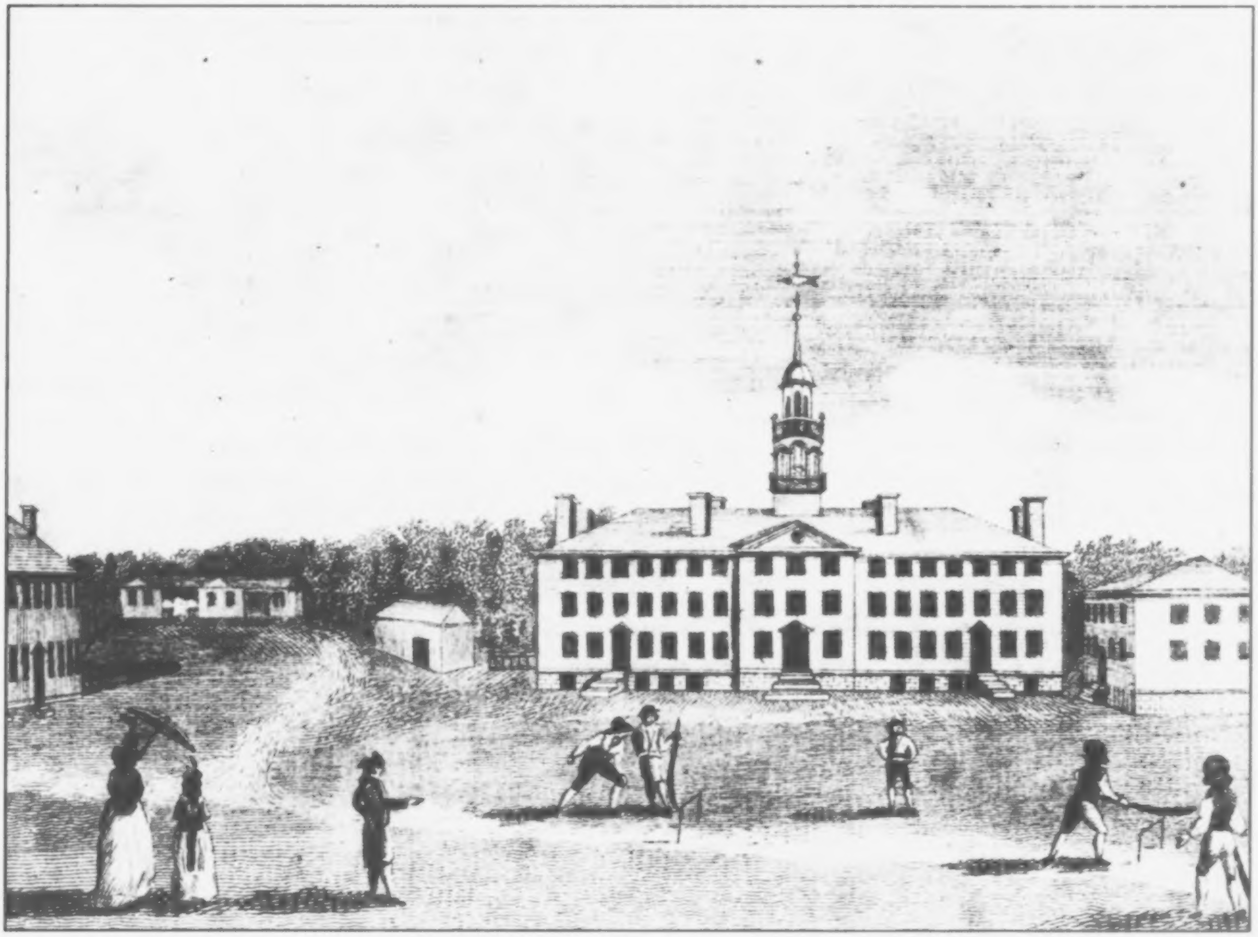
> *Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.*

The Georgia law revoking the Yazoo grant was accordingly ruled unconstitutional. In holding that a legislative act granting land was in its nature a binding contract protected by the Constitution, the Marshall Court significantly enlarged the meaning of the term "contract."

Dartmouth College v. *Woodward*

The next important extension of the contract clause came in 1819, when the Court in *Dartmouth College* v. *Woodward* held that the Constitution protected corporate charters from legislative interference. Like *Fletcher*, this case began as a local political struggle before becoming a judicial question of national significance. The specific issue before the Court was the constitutionality of acts passed by the New Hampshire legislature in 1816 by which Dartmouth College (now to be called Dart-



Dartmouth College, 1793. Library of Congress.

mouth University) was brought under the direct control of the state. The New Hampshire Superior Court in 1817 upheld the state laws, maintaining that Dartmouth College was a public corporation established for public purposes and that the contract clause could not limit the state's power to regulate and modify its own civil institutions. The former trustees, who had been appointed under the royal charter of 1769 establishing the college, sought relief in the federal Supreme Court.

Speaking for the Supreme Court, Marshall had no difficulty in finding in the original charter incorporating Dartmouth College "every ingredient of a complete and legitimate contract." At the same time, he rejected a reading of the contract clause "in its broad unlimited sense."

> *That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice.*

As an example of state legislation outside the reach of the contract clause, Marshall mentioned divorce laws, which necessarily affected marriage contracts. The real point at issue, he insisted, was the "true construction" of the 1769 charter. If that charter had in fact created a public institution for public purposes, then the New Hampshire legislature could do as it pleased, "unrestrained by any limitation of its power imposed by the constitution of the United States."

> *But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred.*

The chief justice then launched an elaborate argument in support of the proposition that Dartmouth College was a "private eleemosynary institution." Having already found the College charter to be a contract, he contended further that this was a contract which the Constitution "intended to withdraw from the power of state legislation." He was clearly troubled, however, that his application of the contract clause might not square with the intention of the framers.

> *It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures.*

The authors of the Constitution, Marshall admitted, did not contemplate the case of a corporate charter when they adopted the contract clause. But if a rare or unforeseen case had no part in establishing the constitutional rule concerning the inviolability of contracts, was such a case to be excluded from the operation of the rule?

> *It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.*

In short, the contract clause had applicability beyond just those laws (installment laws and laws postponing executions for debt) the founding fathers explicitly wished to prohibit. Marshall thus shrewdly surmounted the difficulty of reconciling his interpretation of the Constitution with the intention of the framers. The rule of construction he employed — that exceptions to general constitutional prohibitions against the states must be clearly stated in the instrument itself — obviously permitted him great latitude in expounding the Constitution. It would serve him well on future occasions.

The Court held the New Hampshire acts to be repugnant to the Constitution, and Dartmouth University once again became Dartmouth College. More than just the fate of a small New England college was involved in the *Dartmouth* decision. The principle that corporate charters were protected by the Constitution ensured that private corporations would have a large measure of freedom from public control. This freedom in turn facilitated the development of the corporation into the dynamic institution of American capitalism. Historians are in general agreement that the Marshall Court's decisions (including others besides the contract cases) stimulated the economic growth of the new nation, most importantly by creating a wide scope for unfettered entrepreneurial activity. In effect, if not deliberately intended, constitutional law under Marshall suited the requirements of a burgeoning capitalist economy.

Sturges v. *Crowninshield*

Another decision rendered at the 1819 term of the Supreme Court also directly affected the economic life of the country. *Sturges* v. *Crowninshield* brought into question the power of the states to enact bankruptcy legislation, a question the more urgent because it coincided with a business panic and the onset of a severe economic depression. Although Congress was empowered by the Constitution to establish "uniform Laws on the subject of Bankruptcies," there was no national bankruptcy statute at the time. The extent to which the states could respond to the economic crisis hinged on the outcome of this case.

Sturges involved the validity of a New York law that provided for the discharge of a debtor from future liability for his debts after he assigned his property to his creditors. The debtor, in other words, could start with a clean slate, enjoying the free use of such assets as he might then acquire. If there is some doubt whether the framers of the Constitution understood "contract" to embrace legislative grants and corporate charters, none exists for the kinds of contracts between private individuals that produced this case. Surely it was such contracts, if any, that were meant to have constitutional protection against impairment. But was bankruptcy legislation by the states prohibited by the Constitution? To answer this question the Court, as in the other cases, could not avoid an inquiry into the intentions of the framers.

In testing the constitutionality of state bankruptcy laws, the Court had to construe not only the contract clause but also the clause giving Congress power to establish uniform bankruptcy legislation. At least one justice, Bushrod Washington, believed the Constitution gave Congress exclusive power over the subject of bankruptcy. In a circuit court case of 1814, Washington voided a Pennsylvania law on that ground while also finding it to be in violation of the contract clause. Marshall commented on this very case in a private letter to Washington, dated April 19, 1814 (recently uncovered and never before published). This letter shows that the chief justice at that time had no fixed views on the subject — indeed, it "had never before attracted my attention." Yet he does adumbrate certain lines of argument that were developed in *Sturges* and in the later case of *Ogden* v. *Saunders* (1827).

> *Without examining the subject, I had taken it for granted that the power of passing bankrupt laws resided in the states. It now appears to me more doubtful than I had supposed it to be. Congress has power "to establish an uniform rule of naturalization & uniform laws on the subject of bankruptcies throughout the United States." This would seem to empower Congress to regulate the whole bankrupt system, & to require in all the states a conformity to the laws of the national legislature. But unless Congress shall act on the subject, I should feel much difficulty in saying that the legislative power of the states respecting it is suspended by this part of the constitution.*

As for the contract clause, Marshall admitted that it "was probably intended to prevent a mischief very different from any which grows out of a bankrupt law."

> *The fears & apprehensions which produced that limitation on the legislative power of the states were of a different description. Paper money, the tender of useless property, & other laws acting directly on the engagements of individuals were then objects of general alarm & were probably in the mind of the convention. Yet the words may go farther; if they do on a fair & necessary construction, they must have their full effect.*

The implication seems clear that Marshall even then was inclined to bring bankruptcy acts within the contract clause. Yet he was not prepared to state unequivocally that *all* such acts were unconstitutional.

> *It may also be doubted whether a bankrupt law applying to contracts made subsequent to its passage may fairly be termed a law impairing the obligation of contracts. Such contract is made with a knowledge that it may be acted on by the law. But this would not apply to contracts made out of the state. I should feel no hesitation in saying that a particular act of the state legislature discharging a particular individual who had surrendered his property was invalid. But a general prospective act presents a question of considerable difficulty. I have not thought of the question long enough, nor viewed it in a sufficient variety of lights to have a decided opinion on it, but the bias of my mind at the moment is rather in favor of the validity of the law though I acknowledge I feel very great doubts whether I shall retain that opinion.*
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> John Marshall to Bushrod Washington
> 19 April 1814.

Sturges v. *Crowninshield* provided the occasion for a deeper inquiry into the subject, out of which emerged Marshall's settled views on the constitutionality of state bankruptcy legislation. Having privately doubted that the constitutional grant of power to Congress precluded the states from enacting such laws, the chief justice now turned this doubt into a principle of constitutional law.

> *But be this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.*

In his mind the only question was whether the New York law impaired the obligation of contracts. He had no doubt that it did, for it discharged the debtor "from all liability for any debt previously contracted." Marshall had no problem with traditional insolvency laws, which liberated the person of the debtor but subjected his future assets to payment of his debts.

Still, Marshall had to meet the objection that bankruptcy laws, which the states had long been in the habit of enacting, were not among the obnoxious acts the convention sought to prohibit. In his letter to Washington, he had hinted that the words of the contract clause may go beyond the particular mischiefs that produced the clause, adding: "If they do on a fair & necessary construction, they must have their full effect."

The framers, the chief justice explained, were careful not only to prohibit particular means by which contracts could be evaded — paper-money laws, for example — but also "to prohibit the use of any means by which the same mischief might be produced." The contract clause was purposely expressed in general terms to embrace unforeseen cases. A favorite theme that runs through all of Marshall's decisions in these cases is that the contract clause was not directed at particular laws but was intended "to establish a great principle, that contracts should be inviolable."

> *If, as we think, it must be admitted that this intention might actuate the convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say that these words prohibit the passage of any law discharging a contract without performance.*

Although the Court was unanimous in *Sturges* v. *Crowninshield*, the judges were in fact deeply divided on the reach of the contract clause over state bankruptcy legislation. All agreed that the New York law in this case, which was enacted *after* the contract was made, was invalid. But what about a law that was already in existence at the time the contract was made? *Sturges* did not explicitly deny the power of the states to enact bankruptcy laws that applied only to contracts made after the passage of the act. A case that brought this question squarely into view reached the Supreme Court in 1827 — *Ogden* v. *Saunders*, which like *Sturges* concerned the constitutionality of a New York law. This time the Court majority upheld the state law on the ground it was within the knowledge of the parties and so formed a part of the contract. Chief Justice Marshall was not among this majority, and for the first and only time in his career he was compelled to register a dissent in a major constitutional case.

More than a dozen years before, in his letter to Justice Washington, Marshall had leaned toward favoring the validity of a general bankruptcy law that affected only future contracts, though he felt "very great doubts whether I shall retain that opinion." He abandoned that opinion by the time of the decision of *Sturges*, but not until *Ogden* v. *Saunders* did he have an opportunity to present his views in full. Given his earlier exposition of the contract clause, his dissent from the majority opinion is not surprising. Once again he insisted that the general language of the clause signified a general intent to prohibit *all* laws that impaired the obligation of contracts, not just those that were "retrospective." Whether the bankruptcy law was enacted before or after the making of the contract made no difference. Had the chief justice's view prevailed, the states would not have been able to enact any bankruptcy law that discharged a debtor from liability for his debts. In view of Congress' failure to pass a national bankruptcy statute, such a blanket prohibition on the states might have proved excessively harsh and provoked popular wrath against the Court.

Marshall's refusal to bow to political expediency is a measure of the depth of his convictions about the meaning of the contract clause. If he gave that clause an expansive reading and broad application, it is because he sincerely believed that the framers of the Constitution intended such a reading. In his hands the contract clause performed a function similar to that later undertaken by the Fourteenth Amendment, adopted after the Civil War. That amendment — which declared that no state could "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" — became during the twentieth century the Supreme Court's instrument for applying the Bill of Rights to the states. In light of this development, Marshall's comment (in *Fletcher* v. *Peck*) that "the constitution of the United States contains what may be deemed a bill of rights for the people of each state" has special resonance. This statement neatly summarizes the major theme of his constitutional jurisprudence.

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Religion and the Constitution

by A. JAMES REICHLEY

Shortly after the adjournment of the Constitutional Convention in 1787, Alexander Hamilton encountered on the street in Philadelphia a professor from nearby Princeton College who told him that the Princeton faculty were "greatly grieved that the Constitution has no recognition of God or the Christian religion." Hamilton replied: "I declare, we forgot it!"

Hamilton's dodge was among the first in a long series of efforts by American statesmen to reconcile broad social support for religion with cultural pluralism and belief in the rights of individual conscience. In our own time, differences over the role of religion in public life have fueled important political issues and given rise to both fear and resentment among major social groups. It is, therefore, worthwhile to reexamine the constitutional framework for relations between religion and civil society that the founders eventually worked out through the First Amendment, and to trace the evolving interpretations through which this structure has since been applied.

Religious enthusiasm, buffeted by the winds of the Enlightenment, was at a relatively low ebb in America in 1787. The effects of the Great Awakening of the 1740s, which had remained strong at the time of the Revolution, had receded, and the beginning of the Second Great Awakening was still more than a decade in the future. Nevertheless, about 75 percent of Americans had their roots in some form of Calvinism, and most of the rest belonged to Anglican, Baptist, Quaker, Catholic, or Lutheran traditions. A few Jewish congregations had gathered in places like Newport, Rhode Island, and Charleston, South Carolina. The reason the framers of the Constitution avoided the topic of religion, except for the prohibition of a religious test for national public office in Article VI, was neither hostility nor indifference, but that they had not yet developed a conceptual means for relating religion to public life in a free society.

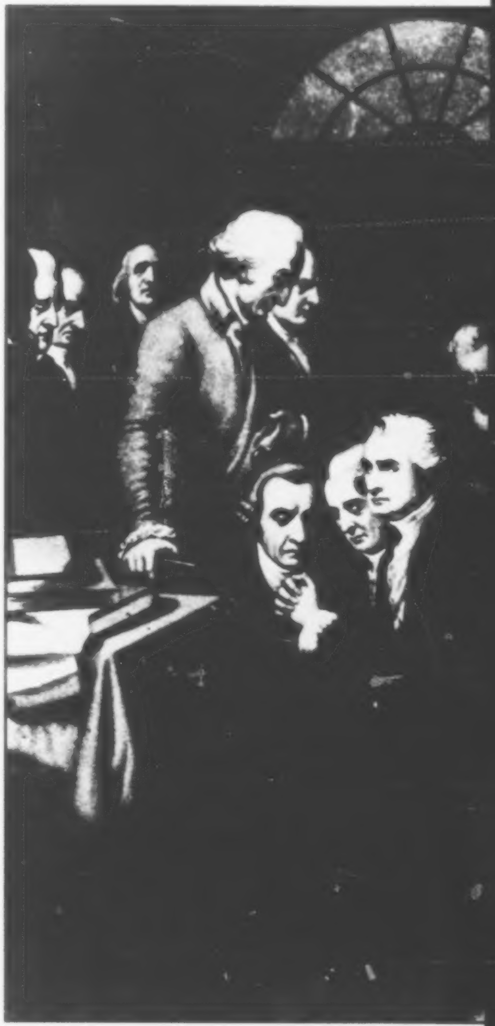
Enactment of the First Amendment

Most of the founders were not particularly pious men. Some, like Thomas Jefferson and Benjamin Franklin, were personally religious in only a very broad and loosely defined sense. But practically all were convinced that republican government rests on moral values that spring ultimately from religion. They shared George Washington's view, that "of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports." Even Jefferson, despite his personal skepticism, held that religion should be regarded as "a supplement to law in the government of men," and as "the alpha and omega of the moral law."

Belief in the socially beneficial effects of religion led some of the founders, including Washington, John Adams, Patrick Henry, and John Marshall, to favor maintenance of established churches, directly supported by public funds, in their own states. Others, notably Jefferson and James Madison, argued that government should play no role whatever in direct sponsorship of religion. All agreed that there could be no established national church in a country already so culturally various and intellectually diverse as the new United States.

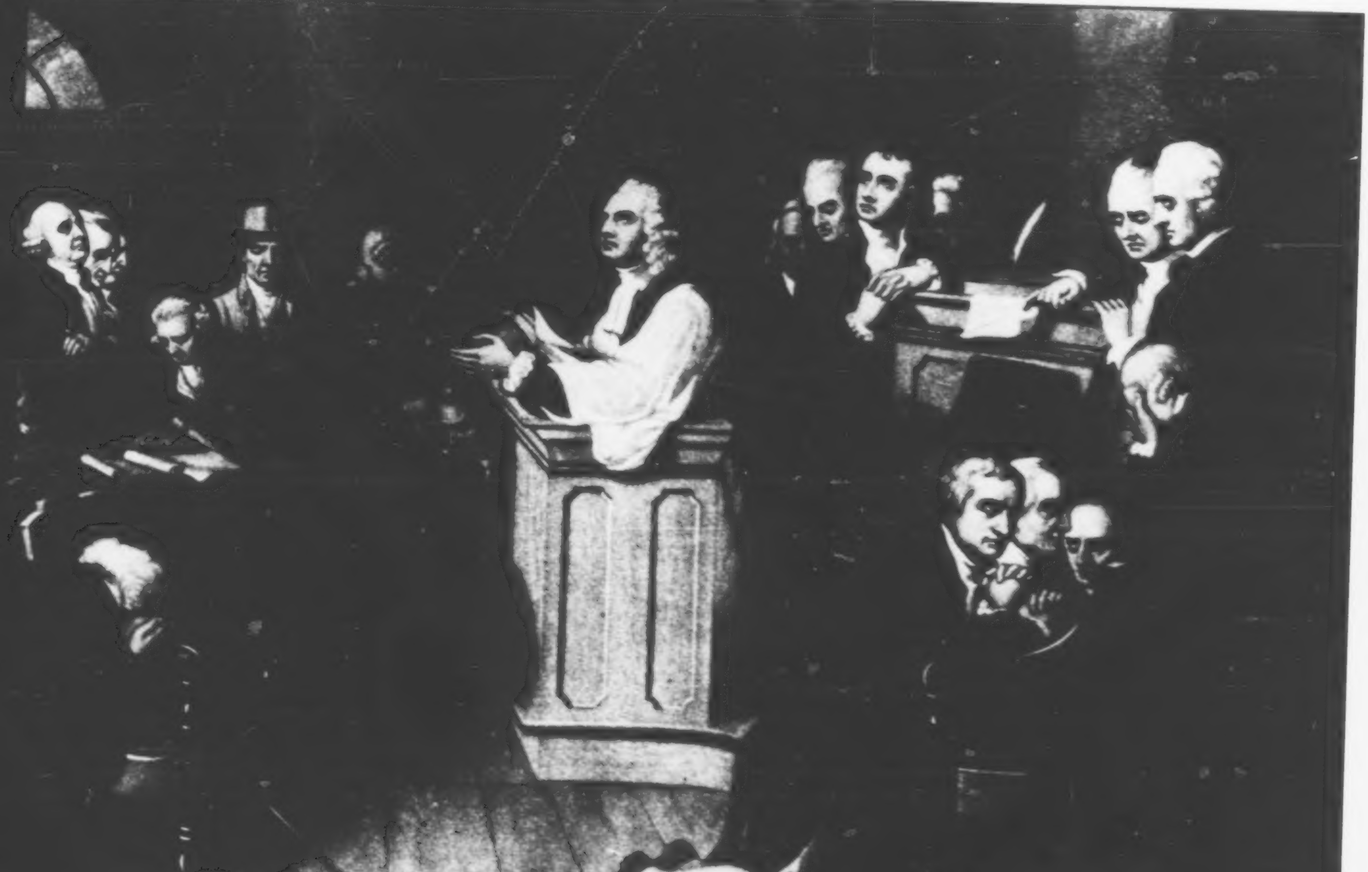
Their common objective was to secure the moral guidance and support of religion for the republic, while escaping the political repression and social conflict with which religion had often been associated throughout history, and specifically in the public life of the former colonies. Since no scheme of generally accepted constitutional doctrine to achieve this end was available, the framers of the original Constitution ducked the subject almost entirely.

The need to define the relationship of religion to civil society, however, would not go away. In the



bitter battle over ratification of the Constitution in the states, some opponents attacked the proposed federal charter's failure to include a guarantee of the free exercise of religion. Several of the state ratifying conventions, including those in Virginia and New York, passed resolutions calling for an amendment declaring the "unalienable right to the free exercise of religion according to the dictates of conscience," and assuring that "no particular religious sect or society" would be "favored or established by Law in preference to others."

When the first Congress met in 1789, James Madison, who a few years before had led the fight for passage of Jefferson's bill for religious liberty in Virginia, quickly moved in the House of Representatives that the Constitution be amended to incorporate a Bill of Rights, including prohibitions against establishment of a national religion or infringement on "full and equal rights of conscience" by either the federal government or the states. When Madison's bill



The First Prayer in Congress, *September 1774, Carpenters Hall, Philadelphia, by T. H. Matteson. Library of Congress.*

came to the floor of the House for debate, several members of Congress objected that it might be interpreted to undermine religion. The clause dealing with establishment, Peter Sylvester of New York warned, "might be thought to have a tendency to abolish religion altogether." Benjamin Huntingdon of Connecticut, one of the five states that still maintained an established church, asked if the amendment could be construed to prohibit state "support of ministers or building of places of worship?" Huntingdon said he favored an amendment "to secure the rights of conscience," but not one that would "patronise those who profess no religion at all." At Madison's suggestion, the bill was reworded to make clear that the prohibition against establishment applied only to the federal government. The entire Bill of Rights was then approved by the House without major change.

In the Senate, the ban against infringement on rights of conscience by the states was dropped, presumably reflecting the Senate's particular concern for upholding the authority of the state governments, and the religion clauses aimed at the federal level were combined in a single amendment with provisions for freedom of speech and a free press. The language of the religious clauses was considerably watered down, requiring only that Congress "make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion." Under this formulation, even the national government would be permitted to give direct financial support to the churches, and would be excluded only from meddling in matters of theology or ritual.

A conference committee between the House and the Senate, which Madison is generally believed to have dominated, kept the Senate's textual framework combining the religion clauses with the free speech and free press clauses but toughened the religion clauses to read, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This formulation was approved by two-thirds majorities in both houses of Congress, and later ratified by the required three-fourths of the state legislatures—giving us the First Amendment as we have it today.

What Did the Fourteenth Amendment Do?

The first thing to be said about the First Amendment is that when enacted it clearly applied only to the federal government. Madison's proposed amendment to prohibit infringement by the state on individual rights of conscience would have done nothing to upset the established churches still supported by some of the states. (The last of the state religious establishments was finally terminated when Massachusetts disestablished the Congregational church in 1833.) But Congress did not approve even this modest prohibition. During the first half of the nineteenth century, the Supreme Court issued a series of decisions specifically placing the state governments outside the authority of the First Amendment.

At the end of the Civil War, Congress proposed and the states ratified the Fourteenth Amendment, prohibiting the states from abridging "the privileges or immunities of citizens of the United States," or depriving "any person of life, liberty, or property without due process of law," or denying any person "equal protection of the laws." The chief purpose of the Fourteenth Amendment, everyone agreed, was to extend full rights of citizenship to the former slaves who had been freed under the Emancipation Proclamation or the Thirteenth Amendment. Beyond that, some of the principal sponsors of the amendment spoke vaguely of giving the federal government power to enforce "the personal rights guaranteed and secured by the first eight amendments to the Constitution." But the idea that the entire Bill of Rights might be extended to cover the states by the due process clause or the privileges or immunities clause of the Fourteenth Amendment played no significant part in the debates over the amendment in Congress or the state legislatures.

For some years thereafter, neither the Supreme Court nor the governmental community at large showed any signs of believing that the states were now subject to the Bill of Rights. In 1876, the Grant administration sought enactment of a constitutional amendment that would have specifically prohibited the states from aiding church-related schools. Neither supporters nor opponents of the proposed amendment (which passed the House and failed in the Senate by only two votes) suggested that such aid might already be unconstitutional. When some imaginative jurists in the 1890s began to argue that the Fourteenth Amendment prohibited infringement by the states on some of the rights set forth in the first eight amendments, the majority of the Court at first rejected this claim.

Beginning in the 1920s, however, the Supreme Court gradually discovered a growing portion of the Bill of Rights in the due process clause of the Fourteenth Amendment. In 1925, the Court ruled in *Gitlow* v. *New York* that the free speech and free press clauses of the First Amendment applied to the

[The common objective of the founders] was to secure the moral guidance and suppport of religion for the republic, while escaping the political repression and social conflict with which religion had often been associated throughout history . . . .

states. (Gitlow was the author of a left-wing publication that had been suppressed by the state of New York. He did not himself benefit from the new interpretation, since the Court held that his book was an active "incitement" to violence, and therefore not shielded by the First Amendment.)

In 1940, the free exercise clause and the establishment clause were at last extended to cover the states. The Court decided in *Cantwell* v. *Connecticut* that the First Amendment prohibited the state from prosecuting a member of the Jehovah's Witnesses sect for breaching the peace by playing a recorded diatribe against the Catholic religion on a streetcorner in a neighborhood of New Haven heavily populated by Catholics. From the legacy of *Cantwell* has sprung the large body of decisions through which the Court has defined and generally broadened the rights of citizens against infringement on religious liberty or establishment of religion by either the federal government or the states.

The line of decisions based on the free exercise clause, though often controversial, has produced a reasonably clear and consistent set of guidelines on how far religious liberty goes, and where other social values, such as public safety, the rights of children to education in basic skills and citizenship, and the need for discipline in the armed forces, must take precedence.

The Meaning of "Establishment"

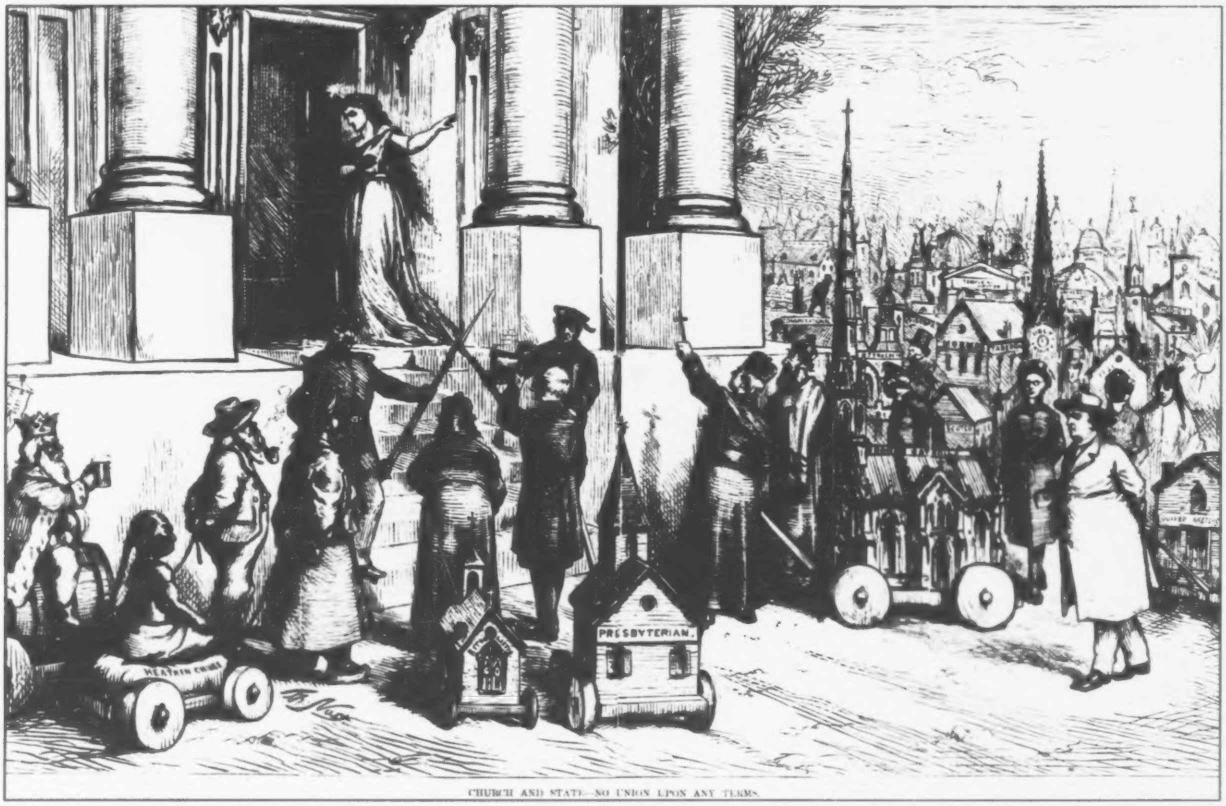
In contrast to the decision on "free exercise," the Court's rulings based on the establishment clause—including the 1948 decision prohibiting the use of public school facilities for religious instruction, the 1962 decision banning organized prayer in the public schools, and the great tangle of decisions that forbid some but not all forms of public aid to students in parochial schools—have produced a disconcerting muddle. "We are divided among ourselves," Justice Byron White ruefully conceded in 1981, "perhaps reflecting the different views on this subject of the people in this country." A part of the reason for the Court's intellectual disarray on establishment clause issues may be the inherent difficulty of finding the prohibition of religious establishment in the Fourteenth Amendment's protection against deprivation of "liberty."

Recently, some conservative scholars and public figures have suggested that the Court may have erred in the whole line of decisions descending from *Gitlow*. Some have even proposed returning authority over most First Amendment issues to the states. It is extremely unlikely that any foreseeable Court would abandon federal protections against infringement by government at any level on basic freedoms of speech, press, or religion. There is some possibility that a future Supreme Court might modify the current reach of the establishment clause. But civil libertarians argue that limiting the coverage of the establishment clause could encourage some states, such as Utah, where Mormons constitute about two-thirds of the population, actually to establish a church. Improbable though this result may be, the claim provides an effective last-ditch defense against limiting even the establishment clause to the federal government.

In any case, even if the states were exempted from the reach of the establishment clause, many important church-state issues, such as federal aid to students in parochial schools and the many symbolic relationships that continue to exist between religion and the federal government, would still have to be decided at the federal level. From a practical standpoint, the most important question regarding the establishment clause now is not the extent of its coverage but what "establishment" means in the context of the First Amendment.

Some interpreters argue that the founders intended that the prohibition against establishment should do nothing more than prevent the government from singling out a particular church for support or recognition, as most of the colonies had done before the Revolution, and as many European governments still do today. (Whether the "intentions" of the founders should have any bearing on current interpretation is a question that I will turn to shortly.) In this view, the establishment clause presents no impediment against government giving support, financial or otherwise, to religious institutions, so long as such aid is distributed impartially among the several churches, or among churches and secular institutions supplying similar services.

One trouble with this interpretation is that it does not go beyond what would have been permitted under the First Amendment in the form originally passed by the Senate in 1789. Since the establishment clause as finally enacted contains tighter language, it is reasonable to assume that Congress meant to require something more strict. Furthermore, as Freeman Butts has pointed out, the founders had before them examples of religious establishments in states like Maryland and South Carolina under which public support was authorized for a number of different denominations (all Protestant). Their understanding of establishment, therefore, must have included more



CHURCH AND STATE—NO UNION UPON ANY TERMS.

Cartoon by Thomas Nast, 25 February 1871, Harper's Weekly. *Library of Congress.*

than favoring a particular church.

At the opposite extreme of interpretation are those who would apply literally Jefferson's phrase calling for a "wall of separation between church and state." (Jefferson's remark appeared in a letter written more than ten years after the adoption of the First Amendment, but it has been cited so often in Court opinions that many Americans have come to regard it almost as part of the Constitution.)

According to these strict separationists, the establishment clause requires absolute neutrality by government, not only among religions, but also between religion and irreligion, and prescribes keeping all activities of government, including conduct of the public schools, sealed as tightly as possible against any hint of religious influence or contact. "Neither a state nor the Federal Government," Justice Hugo Black wrote in 1947, in an opinion still approvingly quoted by separationists, "can pass laws which aid one religion, aid all religions, or prefer one religion over another .... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt, to teach or practice religion." The Supreme Court has carried this line of reasoning to the point of prohibiting display of the Ten Commandments in the hallways of public schools, though the Court itself sits beneath a frieze depicting promulgation of the Ten Commandments, and of forbidding use of public school teachers to give remedial instruction to mentally handicapped children in parochial schools.

It is difficult indeed to find mandate for such relentless exclusion of religion from publicly supported activities in the intent of the founders. The first Congress that enacted the First Amendment also appointed chaplains in both houses and adopted as part of the ordinance governing the Northwest Territory the directive, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged." Presidents Washington, Adams, and Madison, though not Jefferson, issued proclamations establishing national days of prayer and thanksgiving. Washington began the custom, continued by all his successors, of adding the phrase, "so help me God," to the presidential oath of office.

A Positive Freedom

Congress' decision to include the religious clauses in a single amendment with the free speech clause and the free press clause provides a useful indicator of intention. Clearly, Congress did not regard freedom of speech or of the press merely as privileges for the enjoyment of individuals. Both of these freedoms were justified, not only as personal rights, but also as essential supports for the conduct of a free society and republican government. There is every reason to believe that the founders saw the free exercise of religion in the same light: both as a guaranteed liberty to the individual and, in Washington's words, as an "indispensable" support for "political prosperity." Free exercise of religion, that is, was not merely to be permitted, like such

The line of decisions based on the free exercise clause, though often controversial, has produced a reasonably clear and consistent set of guidelines on how far religious liberty goes . . . . In contrast. . ., the Court's rulings based on the establishment clause . . . have produced a disconcerting muddle.

unspecified general rights as travel or recreation, but positively to be encouraged, like the free expression of ideas, as a vital contributor to the public good.

Of course, the First Amendment includes no parallels to the establishment clause in the areas of speech or the press. Government, beside encouraging free discussion and a free exchange of ideas, may also, under the First Amendment, enter the marketplace of ideas with substantive arguments and policy proposals of its own. It has no such right in the area of religion. The founders recognized the dangers to social harmony, personal freedom, and religion itself if government attempts to sponsor its own versions of religious practice or belief. To counteract these dangers, they enacted the establishment clause. They specifically rejected any public religion—or civil religion, as it is now sometimes called—for the United States. By prohibiting establishment of religion, they intended that government should give no direct support or sponsorship to any church, or any group of churches, or even to the cause of religion in general. But they did not intend that prohibition of establishment should extend to preventing symbolic acknowledgment of the dependence of civil government, as of all life, on transcendent direction, or to impeding normal functions of government in areas like education and health care that might indirectly benefit church-related institutions.

The founders sought to maintain a society in which civil government would receive moral support and guidance from transcendent values. To help promote continuing renewal of the source for recognition of these values, they enacted the free exercise clause. To assure that the source would not be polluted by the narrow political interests of either government or the institutional churches, they added the establishment clause.

Judicial Activism

In recent times, a school of legal philosophers known generally as judicial activists, or among legal scholars as "noninterpretivists" (because they do not believe the courts should be limited to interpreting the text of the Constitution), has held that the intentions of the framers of the Constitution are to a great extent unknowable, and in any case should have little bearing on current understanding of basic law. Lawrence Friedman, professor of law at Stanford, has argued that in the modern United States part of the function of the courts should be to act as "brooms," sweeping out legal anachronisms that "cannot now be repealed" because of political blockages. In performing this cleanup function, Friedman suggests, the courts should: draw on a general sense of where society currently stands. "The measuring rods are very vague, very broad principles. These are attached loosely to phrases in the Constitution. They are connected more organically to the general culture."

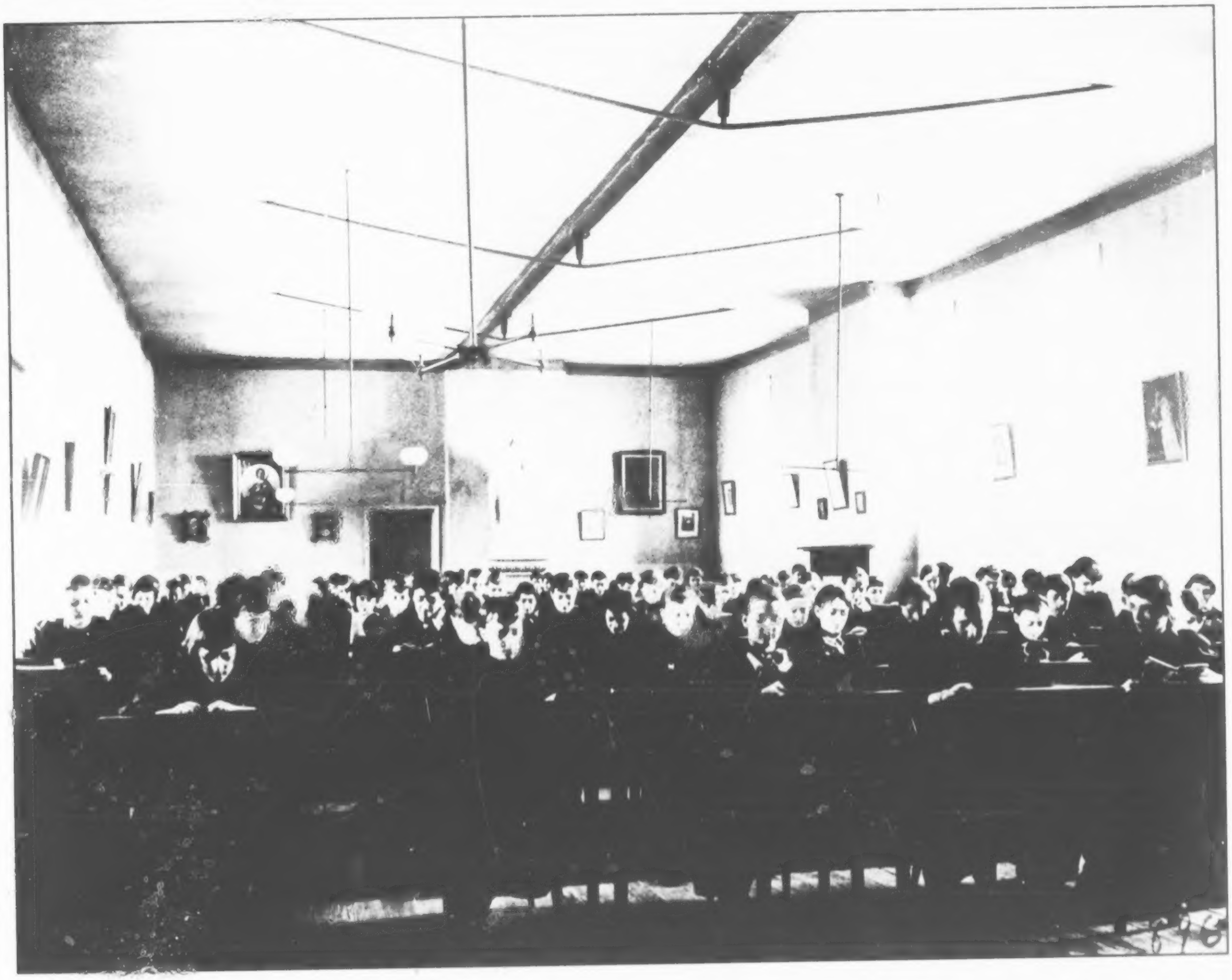
The question of what is meant by "general culture" as a standard for judicial interpretation is particularly problematic with regard to establishment clause issues. If general culture is equated with public opinion, many of the Court's decisions in the 1960s and 1970s on establishment clause cases were without ground. National opinion polls have consistently shown a large majority of the public favoring return of organized prayer to the public schools, for example. By general culture, Friedman may mean public opinion if the public were as well informed as Supreme Court justices, or opinion at the more refined levels of culture, or opinion elevated by judicial vision. There is something to be said for all of these as partial sources for judicial reasoning, but all hold obvious perils as standards to be relied on by the courts in a political democracy.

The activists surely are right when they argue that the Constitution should not be employed as a judicial cookbook, in which legal recipes can be found to apply to particular cases. As Laurence Tribe, a leading proponent of noninterpretivism, says, the courts should search out "the principles behind the words" in the written Constitution. But in doing so, they must, if their decisions are to be accepted as objectively valid, seek the principles that moved the authors of the Constitution and its amendments rather than impose standards derived from a vaguely conceived contemporary "general culture." Tribe concedes, "The Justices may not follow a policy of 'anything goes' so long as it helps put an end to what they personally consider to be injustice."

During the 1960s and the 1970s, some of the Supreme Court's strict separationist decisions, perhaps reacting against an earlier period of excessive passivity, went well beyond any principles that can credibly be ascribed to the enactors of the First or Fourteenth Amendments. To claim otherwise is like suggesting that the enactors of the Fourteenth Amendment had a secret plan to reimpose slavery.

Return to Accommodationism

More recently, the Court has appeared to move back toward more traditional interpretations. In 1983, the Court upheld the constitutionality of the Nebraska legislature's em-



Georgetown [illegible] School, circa 1900. Library of Congress.

ployment of a chaplain and approved a scheme through which Minnesota permits parents to take a state income tax deduction for part of the costs of educating their children in parochial schools. In 1984, the Court found no implication of establishment in maintenance by the city government of Pawtucket, Rhode Island, of a nativity scene during Christmas season. And in 1986 the Court let stand on procedural grounds a policy instituted by the public schools in Williamsport, Pennsylvania, of making school facilities available for use by volunteer prayer groups on the same basis as other extracurricular clubs.

The Court's apparent trend toward a more accommodationist stance has by no means been undeviating. In 1985, the Court ruled unconstitutional an Alabama statute authorizing a one-minute period of silence in the public schools "for meditation or voluntary prayer"—though a concurring opinion by Justice Sandra O'Connor suggested that state laws calling for moments of silence without specific mention of prayer might "not necessarily manifest the same infirmity." Also in 1985 the Court issued the prohibition against use of public school teachers to give remedial instruction to handicapped children in parochial schools mentioned above.

Many of the Court's recent establishment clause decisions have been closely divided. To the extent that prediction is possible, it seems likely that the accommodationist trend will continue, though not nearly back to the point at which the previous trend toward strict separationism began in the 1940s. The principle of institutional separation between church and state will surely be maintained, though the line of separation is likely to be regarded more as a fence through which church and state carry on mutually beneficial interactions than as a grimly impenetrable barrier or wall. In any case, the question of what the Constitution intends for the relationship between religion and civil government will no doubt continue to cause much controversy—a tribute, after all, to the unquenchable vitality of religion in American national life.

Suggested additional reading

Robert N. Bellah and Phillip E. Hammond, *Varieties of Civil Religion* (1980).

Walter Berns, *The First Amendment and the Future of American Democracy* (1985).

R. Freeman Butts, *The American Tradition in Religion and Education* (1950).

Leo Pfeffer, *God, Caesar, and the Constitution* (1975).

Laurence H. Tribe, *God Save this Honorable Court* (1985).

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The Constitution and Criminal Procedure

by JOHN C. HALL

On September 1, 1982, Santa Clara, California police officers received an anonymous tip that an individual named Dante Carlo Ciraolo was growing marihuana in his back yard. Because two fences completely enclosed the yard, obstructing observation from the street level, the officers flew over the property in a small airplane and observed the marihuana from that vantage point. Using the information thus obtained, the officers acquired a search warrant and seized 73 marihuana plants, each 8–10 feet in height. Ciraolo's conviction in state court, for cultivating a controlled substance in violation of California law, was overturned by the state appellate courts on the ground that the aerial surveillance of his property violated his constitutional rights. On May 19, 1986, the United States Supreme Court declared the overflight permissible under the Fourth Amendment to the United States Constitution, and the evidence thus obtained was properly admitted against Ciraolo at his state criminal trial (*U.S.* v. *Ciraolo*, (1986)).

This case, and the manner in which it was resolved, would present several surprises to the framers of our Constitution. Obviously they would not yet have heard of a state called California, and they would undoubtedly be impressed with the technology which made the overflight of a man's property possible. They probably would be shocked to learn that the same hemp plant which they had used to make rope, and which had been a major cash crop at such notable places as Mount Vernon, had not only acquired a new name but also a new usage. But even beyond these points, perhaps the most puzzling of all would be the knowledge that a local police case could be reviewed by the United States Supreme Court and that provisions found in the federal Bill of Rights would govern its outcome. Such an occurrence would not have been possible in their day. It is interesting to trace the development of the process which made it commonplace in ours.

A More Perfect Union

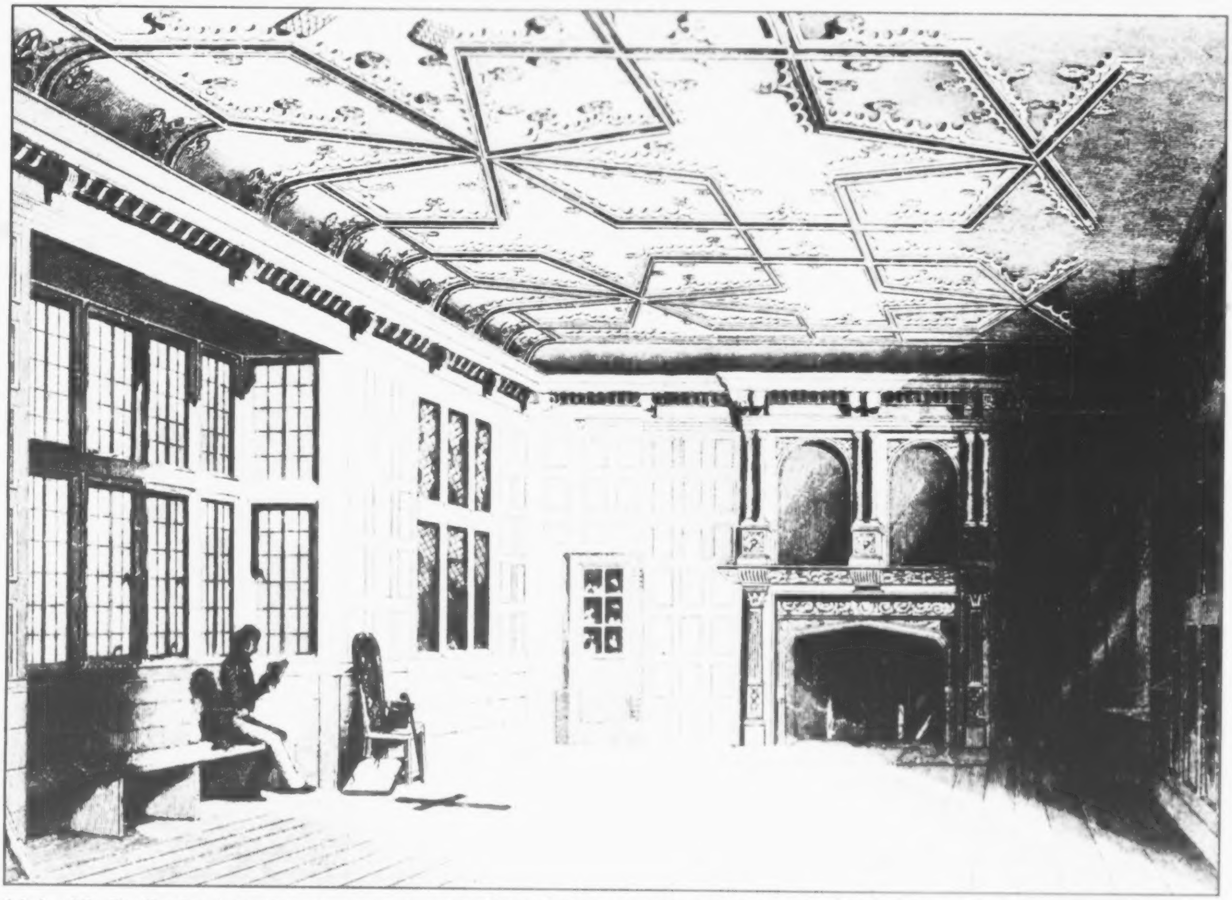
When the delegates met in Philadelphia in the summer of 1787 to begin the work which produced the present Constitution, they recognized the difficulty of the task which confronted them. Their recent past had defined it clearly enough: to establish a central government possessing sufficient power to govern, but without the capacity to become a tyranny. As men who had been born into the rich heritage of English history, they laid strong claim to those principles of self-government and personal liberty which had begun to take tangible form in England with Magna Carta in 1215, and which had continued with a persistent, if somewhat halting, development into the unwritten English constitution and common law of their own day.

It surely is one of the ironies of history that the American Revolution was inspired by English principles of liberty. When the Americans claimed protection against taxation without representation or unreasonable searches and seizures, they were only asserting the rights which they had come to expect as good Englishmen—rights which were deeply rooted in the customs and laws of the people. Disregard of those rights by the English Crown and Parliament not only led to the Revolution, but also persuaded the Americans that a new course must be pursued. There must be a written constitution: a document which would clearly mark the boundaries of government power, and to which the government could be held accountable.

Accordingly, they created a federal government composed of three branches, with the functions and powers of government distributed among those three independent branches to form a system of checks and balances. It could exercise those powers—but only those powers—set forth in the new Constitution, which would henceforth be "the supreme law of the land." Among the grants of power, the framers included certain specific prohibitions, designed to preclude recurrence of some of the abuses suffered under the English. For example, the new Constitution specifically prohibited the enactment of bills of attainder (legislative acts declaring a person guilty of a crime) and ex post facto laws (statutes designed to punish retroactively actions which were not unlawful at the time of commission). In addition, the writ of habeas corpus—a remedy against illegal confinement—could not be suspended except in cases of emergency. Most importantly, the crime of treason, used with such ingenious flexibility by the King and Parliament to quell political dissent throughout English history, was placed above the ebb and flow of political tides by fixing its definition in the Constitution itself.

A Bill of Rights

Notwithstanding the great achievement, many people saw in the document, and the government it created, the seeds of future tyranny. A bill of rights, they insisted, should be added to prevent such an occurrence. The argument that the new government could only do what the Constitution clearly per-



Interior of the Star Chamber, Westminster, from The History of the Ancient Palace and Late Houses of Parliament and Westminster . . . *by Edward Wedlake Brayley and John Britton, 1836. The Folger Shakespeare Library, Washington, D.C.*

mitted, thus making a bill of rights superfluous, offered little consolation to those who feared that this Constitution—which would now be the "supreme law of the land"—could someday be broadly interpreted to grant the very powers which they believed should be prohibited.

This strong sentiment for a bill of rights prompted many of the states, when ratifying the Constitution, to urge upon the new Congress the submission of amendments to accomplish that object. Accordingly, the First Congress to meet following the adoption of the Constitution submitted twelve amendments to the states, ten of which were ratified by 1791, and the first eight of which we now know as the Bill of Rights.

Three of the new provisions would, in time, have great impact on criminal law enforcement: the Fourth Amendment restrictions on searches and seizures; the Fifth Amendment protection against compelled self-incrimination; and the Sixth Amendment guarantee of the right to counsel in criminal cases. Each of these provisions reaffirmed values already deeply rooted in American custom and law, the disregard of which by the Crown and Parliament had done much to fan the flames of revolt among the colonists.

Unreasonable Searches & Seizures Prohibited

Nothing affronted Americans more than the use of general warrants and writs of assistance by the English Government. These general warrants were repugnant for a variety of reasons: universal in nature, they authorized anyone—including private citizens—to execute them; the government could issue and execute them without justification by sworn statements of fact; and they permitted broad searches of any place, unconstrained by time limits or descriptions of the places to be searched or the things to be seized.

The right to be free in one's own home from arbitrary government intrusions was a fundamental tenet of English custom predating even Magna Carta, and while not always scrupulously respected by the Crown, it was nonetheless treasured by the people of America as well as of England. In 1766, Parliament had declared general warrants illegal in the mother country but continued to allow their use in the American colonies. The abuses of the general warrant helped to sow the seeds of revolt and inspired the language of the Fourth Amendment: *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

Today, every law enforcement academy in America provides training in constitutional law, because virtually every aspect of an officer's job touches that area where the authority of government and the liberty of the individual meet.

Compelled Self-Incrimination Prohibited

Americans wrote the protection against compelled self-incrimination into the Fifth Amendment. Early in English history there had developed a particularly obnoxious entity called the Court of the Star Chamber. Originally intended to mete out swift justice to robber bands and other common criminals who preyed upon the good folk of the realm, it eventually grew into a dreaded instrument of the Government to ferret out and punish political dissenters. Its method included the oath *ex officio* which required a person suspected of a crime to answer all questions put to him by the Court. With no jury to hear the evidence, inquisitors used even torture to encourage the cooperation of the accused. As might be expected, the Court of the Star Chamber had great success in obtaining convictions, and that success encouraged other English courts to borrow its tactics. In 1615, the Crown charged a man named Edward Peacham with treason. Prior to his trial in the Court of King's Bench, the Attorney General, Sir Francis Bacon, made the following report to King James I:

> Upon these interrogatories, Peacham this day was examined before torture, in torture, between torture and after torture; notwithstanding, nothing could be drawn from him, he still persisting in his obstinate and insensible denials, and former answers.

Even though the Court of the Star Chamber had been abolished by the time of the Revolution, and its evil influences largely removed from the English courts, its memory remained to influence the men who sought to establish an instrument by which the power of government could be constrained. The protection against compelled self-incrimination would remove the incentive to use torture as a means of extracting confessions from the accused and would place the burden on the government to establish a person's guilt through independent evidence. With that object in view, the Fifth Amendment affirmed: *No person . . . shall be compelled in any criminal case to be a witness against himself.*

The Right To Counsel

Although the right to counsel can be found in early English law, the right to counsel in *all* criminal prosecutions was peculiar to America. Under English law the right to counsel applied in misdemeanor but not felony cases, except when the charge was treason. By contrast, in America, twelve of the thirteen original colonies had granted the right to counsel in all criminal cases, and the inclusion of that right in the Sixth Amendment reflected the value attached to it in that day. The pertinent language reads: *In all criminal prosecutions, . . . the accused shall enjoy the right . . . to have the assistance of counsel for his defense.*

Limited Application

These treasured rights, and some twenty-five others set forth in the Bill of Rights—e.g., freedom of religion, speech, press and assembly—applied only to the Federal Government. The Supreme Court removed any doubts which may have existed on this point in the 1833 landmark decision of *Barron v. The City of Baltimore.* Reviewing the original purpose for inclusion of the Bill of Rights in the Federal Constitution, Chief Justice John Marshall wrote:

> Serious fears were extensively entertained that those powers . . . deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

Since the administration of criminal justice fell predominantly to the states, the greatest degree of law enforcement power in the United States—that which resides in state and local government—operated for much of our history unrestrained by the federal Bill of Rights. The founding generation had not objected because most of the states had bills of rights in their own constitutions with language similar to that of the federal charter. Ultimately, however, the great diversity of interpretation by the state courts of state constitutions led to highly divergent practices in the several states. Still, in the absence of a specific constitutional grant of power, the federal government lacked the capacity to enforce a uniform national standard of criminal procedure.

Due Process—The Law of the Land

The first step toward change came with the adoption of the Fourteenth Amendment in 1868, just three years after the Civil War ended. In many respects that war merely climaxed a long series of challenges to the capacity of the Federal Government to maintain the Union in the face of persistent assertions of sovereignty by the individual states. Now that the issue had been settled by the war, it seemed fitting to establish a common meaning for the principles which had brought the Union into being. Aimed directly at the states, the Fourteenth Amendment declared that no state could "deprive any person of life, liberty, or property, without due process of law."

Those people even vaguely familiar with English and American history needed no introduction to the term "due process." In England as early as the year 1354, it connoted the "law of the land" as first recorded in Magna Carta more than a century before. In America, it was not only incorporated into the Fifth Amendment as a restraint upon the power of the Federal Government, by the mid-nineteenth century it could be found in several state constitutions as well. Unfortunately, the shifting tides of English law and custom had precluded the development of any precise definition of the term in that country, and its incorporation into the Fifth Amendment, among numerous other specified rights, served to camouflage its significance. Consequently, there was little opportunity, or apparent need, for further definition in this country. It stood more as a general—albeit important—expression of principle than a guarantee of anything specific.

The Fourteenth Amendment would change that by providing a common standard—due process—through which both federal and state power could be measured and restrained. Equally important, a uniform meaning and application would henceforth be given to that standard by the Supreme Court of the United States.

Nevertheless, modifications emerged slowly. It was supposed by some that adoption of the Fourteenth Amendment would make the rights guaranteed against the Federal Government by the Bill of Rights equally and immediately applicable against the states. However, the Supreme Court rejected that view shortly after the amendment's adoption. As an alternative, the Court took the position that "due process" includes all of those principles—but only those principles—which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Accordingly, the Court has used such expressions as "fairness," "implicit in the concept of ordered liberty," or "canons of decency and fairness which express the notions of justice of English-speaking peoples," in an effort to describe the parameters of "due process."

These concepts do not necessarily include, nor are they limited to, the provisions of the Bill of Rights. However, with continual interpretation by the Court, "due process"—as it applies to the states through the Fourteenth Amendment—bears a remarkable resemblance to many of the provisions which apply to the Federal Government in the Bill of Rights. The following cases will serve to illustrate the point.

In 1932, a Scottsboro, Alabama jury convicted seven young, indigent, illiterate black men of raping two white girls. Despite their inability to defend themselves or to hire counsel, the trial court took no effective steps to provide the defendants with the assistance of counsel to conduct their defense. The Supreme Court reversed the convictions on the grounds that the denial of effective counsel in a criminal case violated the "due process" clause of the Fourteenth Amendment—not because of the Sixth Amendment guarantee of the right to counsel, but because the Court considered it to be fundamental to the principles of liberty and justice (*Powell* v. *Alabama*, 1932).

In 1936, two black men stood trial in Mississippi on the charge of murdering a white man. The evidence against them consisted of their confessions, which police admittedly extracted through a process of alternately hanging them and then beating them with a large belt. At their trial, which occurred a day and a half following their arrests, the rope marks were still visible on their necks. A deputy sheriff who directed and participated in the "interrogations" testified as to the manner in which he obtained the confessions. The deputy described the beatings as "not too much for a negro; not as much as I would have done if it were left to me." Despite this testimony, the jury returned a verdict of guilty, and the defendants were sentenced to death. Notwithstanding the fact that Mississippi law prohibited the use of an accused's coerced confession at his trial, the state supreme court upheld the convictions. The United States Supreme Court reversed them, not on the grounds that the Fifth Amendment prohibits compelled self-incrimination, but because the Court viewed the extraction of confessions by torture as contrary to the principles of fundamental fairness (*Brown* v. *Mississippi*, 1936).

In 1949, local police in California arrested a man suspected of selling narcotics. At the time of his arrest, he managed to swallow some capsules despite efforts by the police to stop him. The officers conveyed him to a hospital where a stomach pump produced partially dissolved capsules containing morphine. The U.S. Supreme Court reversed his state court conviction, not because the actions of the police violated the Fourth Amendment protections against unreasonable searches and

"MY CASE FELL APART WHEN I PLEADED THE SEVENTEENTH AMENDMENT— IT HAS TO DO WITH THE ELECTION OF SENATORS."

seizures, but because their conduct, the Court rationalized, "shocks the conscience" and therefore violates "due process" (*Rochin* v. *California*, 1952).

In each of these cases the Court carefully pointed out that the basis for reversal lay not in the fact that the state actions had violated some provisions found in the Bill of Rights, but because they violated rights which the Court considered to be fundamental to the American concept of justice. In other words, while disclaiming any intent to incorporate the Bill of Rights into the "due process" clause of the Fourteenth Amendment, the Court ingenuously allowed "due process" to "absorb" certain principles found in the Bill of Rights as well. Supreme Court Justice Cardozo, writing in the 1937 decision of *Palko* v. *Connecticut*, explained the process in this fashion:

These [rights] in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.

This so-called "absorption" doctrine soon gave way to a more direct approach—"selective incorporation." By this process the Court selectively incorporates specific provisions of the Bill of Rights into the Fourteenth Amendment "due process" clause, thus making them applicable to the states. For example, in the 1949 decision of *Wolf* v. *Colorado* the Court held that the Fourth Amendment protections against unreasonable searches and seizures apply to the states through the "due process" clause. Similarly, in the years which followed, the Court held that specific provisions of other amendments also apply to the states, including the Sixth Amendment right to the assistance of counsel in a criminal prosecution (*Gideon* v. *Wainwright*, 1963) and the Fifth Amendment privilege against compelled self-incrimination (*Malloy* v. *Hogan*, 1964).

Each of these provisions directly influences law enforcement—state and local, as well as federal— and establishes a common boundary beyond which government power cannot go. Criminal procedure—the means by which government enforces its criminal laws—has been elevated to constitutional status. Thus, the Supreme Court's interpretations of the Fourth Amendment provisions governing searches and seizures, the Fifth Amendment privilege against compelled self-incrimination and the Sixth Amendment right to the assistance of counsel in criminal prosecutions, are now as relevant and important to local police officers as they are to their federal counterparts.

Conclusion

Today, every law enforcement academy in America provides training in constitutional law, because virtually every aspect of an officer's job touches that area where the authority of government and the liberty of the individual meet. Arrests, searches and seizures, investigative detentions, eyewitness identification, interrogations: all of these everyday law enforcement tasks, and more, are governed by the Federal Constitution. Under their own constitutions, the states may provide greater protections to their people; but by virtue of the "due process" clause of the Fourteenth Amendment, they cannot provide less.

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Constitutional Understanding and American Culture: Future Prospects in Historical Perspective

by MICHAEL KAMMEN

In 1850, just a year before he died, James Fenimore Cooper devoted one of his most intriguing novels to a theme of enduring importance: American misunderstanding of their mode of government in general, and the U. S. Constitution in particular. Titled *The Ways of the Hour*, this novel is also a precursor of the modern mystery story—an elderly couple is murdered and their home is burned. Cooper places the traditional institution of trial by jury at the center of *The Ways of the Hour* and uses it to reveal our naive assumptions concerning democracy. Is it reasonable to presume, he wondered, that a dozen ordinary citizens, after examining all the evidence, can really ascertain "the truth"? Cooper gradually brings his readers to recognize the jury room itself as a microcosm of American society: a focal point where he can intensively scrutinize democratic institutions, politics, and ideals.

At one point in the novel a young man offers a toast to the Constitution, as he holds a copy aloft: "The Constitution of the United States; the palladium of our civil and religious liberties." After his uncle, a constitutional lawyer, challenges the validity of the claim made by the toast, Cooper editoralizes about a larger problem that he regarded as representative of American culture as a whole:

> As for his nephew, he knew no more of the great instrument he held in his hand than he had gleaned from ill-digested newspaper remarks, vapid speeches in Congress, and the erroneous notions that float about the country, coming from "nobody knows whom," and leading literally to nothing. The ignorance that prevails on such subjects is really astounding, when one remembers the great number of battles that are annually fought over this much-neglected compact.

Several young people subsequently engage the skeptical uncle in an extended conversation about the gap between American ideals and less attractive aspects of American reality. When one young man calls attention to the ideals of liberty and justice, the uncle responds that if he means "professions of justice, and liberty, and equal rights," then "in all those particulars we are irreproachable. As *'professors'* no people can talk more volubly or nearer to the point." Finally, referring to a recent convention held to revise the New York state constitution, a niece named Sarah asks: "Why was it necessary to make a new constitution . . . if the old one was so very excellent?" The uncle, whose role is that of the cynic in this extended civics lesson, patronizes Sarah:

> The answer might puzzle wiser heads than yours, child. Perfection requires a great deal of tinkering, in this country. We scarcely adopt one plan that shall secure everybody's rights and liberties, than another is broached, to secure some newly-discovered rights and liberties.

The dialogue is timely for us because it is timeless. We have had a protracted debate in the United States concerning the Constitution as a panacea for newly perceived social ills, concerning the ease with which it can or should be changed, and therefore concerning the very nature of a written constitution that serves as fundamental law. We have had numerous advocates of the concept of an adaptable or living constitution—what Woodrow Wilson constantly referred to as a "vehicle of life"—and we have distinguished jurists and constitutional lawyers who insist that our Constitution does not guarantee perfect government and that it cannot provide a corrective for every single social injustice.

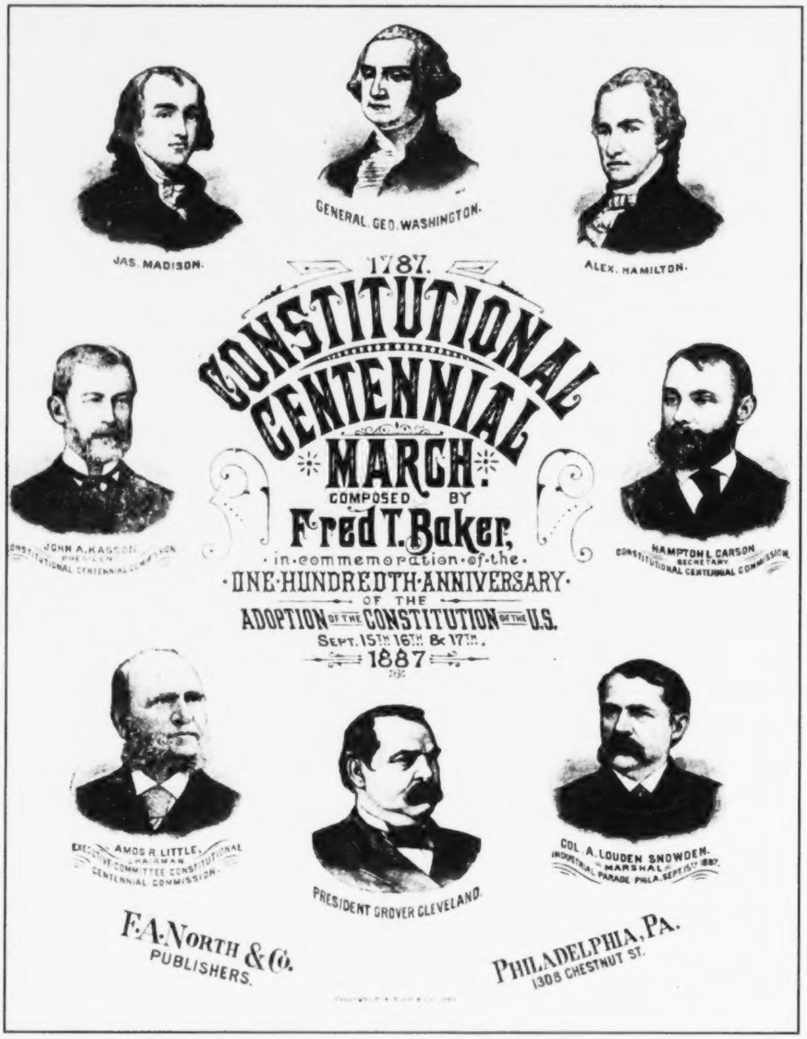
So James Fenimore Cooper managed to encapsulate quite a few basic issues concerning the very nature of our Constitution—issues that are debated just as heatedly today as they were two hundred years ago and in Cooper's mature lifetime as well. Above all, however, Cooper exposed several of the myths and misunderstandings that have surrounded the Constitution ever since its genesis. Was he being unfair? Did he distort the history of public perceptions of our frame of government? The purpose of this essay is to provide a succinct response to such questions.

A "Mythical Charter"

We all know that the U. S. Constitution is a real document. Although we cannot touch it, we may look at the original under glass and a protective saffron light in the Rotunda of the National Archives building in Washington, D. C. We can also read various narratives of the Grand Convention that met at Philadelphia in 1787, and of the prolonged struggle over ratification—an outcome that contrary-minded Rhode Island resisted until May 1790, almost two years after the Constitution had been ratified by the required number of states.

Moreover, anyone with sufficient curiosity and patience can pick up a constitutional history of the United States and read about its legal and political history ever since 1789. In such weighty tomes (a widely used one these days weighs exactly three pounds), we learn how the Supreme Court has interpreted the text; and then, to a lesser degree, what political battles have been fought in its name.

Much less familiar, however, is


GENERAL GEO. WASHINGTON.
JAS. MADISON.
ALEX. HAMILTON.
1787.
CONSTITUTIONAL CENTENNIAL MARCH.
COMPOSED BY
Fred T. Baker,
in commemoration of the
ONE HUNDREDTH ANNIVERSARY
OF THE
ADOPTION OF THE CONSTITUTION OF THE U.S.
SEPT. 15TH 16TH & 17TH.
1887
JOHN A. KASSON
PRESIDENT
CONSTITUTIONAL CENTENNIAL COMMISSION
HAMPTON L. CARSON
SECRETARY
CONSTITUTIONAL CENTENNIAL COMMISSION
AMOS R. LITTLE.
CHAIRMAN
EXECUTIVE COMMITTEE CONSTITUTIONAL CENTENNIAL COMMISSION.
PRESIDENT GROVER CLEVELAND.
COL. A. LOUDEN SNOWDEN.
MARSHAL
INDUSTRIAL PARADE PHILA. SEPT. 15TH 1887.
F.A. NORTH & CO.
PUBLISHERS.
PHILADELPHIA, PA.
1308 CHESTNUT ST.

the history of public responses to the U. S. Constitution. In order to reveal *that* history, it may be useful to think about the Constitution as a "mythical charter," a concept developed by Bronislaw Malinowski, one of the founders of anthropology as a professional discipline. In the Kuba kingdom, for example, located in the central Congo (near Zaire), their "mythical charter" was the skull of an early king wrapped in pieces of cloth, one piece taken from the shirt of every king who had died since the venerable Lashyaang ruled, whose polished skull rested securely at the epicenter of this tidy package.

On various occasions the Constitution has been treated as such an icon, and consequently it has acquired the character of one. Let's take a look at a typical example of nineteenth-century public oratory, the speech given at Plymouth, Massachusetts, by erstwhile Congressman Robert C. Winthrop on December 21, 1870, to celebrate the 250th anniversary of the landing of the Pilgrims. He described American history as a great procession, and then at a critical moment provided this vignette: "There are Hamilton and Madison and Jay bringing forward the Constitution in their united arms; and there, leaning on their shoulders, and on that Constitution . . . is WASHINGTON. . . . There are Marshall and Story as the expounders of the Constitution, and Webster as its defender."

All of those united arms make the founders sound like some sort of undulating octopus. Big George Washington leaning on little Jemmy Madison sounds laughable. Big George leaning on the mythical charter sounds ludicrous. But that's the way it is with mythical charters. They are very sturdy—capable of carrying a nation, never mind a few framers in assorted sizes.

Contradictory Signals

While Winthrop sought simply to inspire awe for the Constitution, other public figures presented more contradictory signals. Daniel Webster, "its defender," was a central figure for the generation following the framers. His career and public utterances offer ample evidence that the Constitution could mean all things to all people. Sometimes Webster called the Constitution "a sacred instrument"—a highly representative statement among Americans of his day—but at other times his cynicism verged upon the view attributed to a Gilded Age congressman: "What is the Constitution among friends?"

Webster did believe in natural law, and he ascribed to it a status higher than the Constitution. He mocked the "constitutional trash" in Andrew Jackson's famous Bank of the United States veto message of 1832. Referring to the working class in 1834, Webster proclaimed that "the Constitution was made to protect this industry, to give it both encouragement and security." On a different occasion, however, he insisted that "a republican form of government rests not more on political constitutions than on those laws which regulate the descent and transmission of property." The mythical charter thereby became a property-protecting text, de-mystified, and reduced to the same level as ordinary legislation. Two occasions, two conflicting messages.

Although Webster had his detractors, he was also widely respected. Few lawyers have argued more effectively before the U. S. Supreme Court and few Americans have had their orations memorized by mil-

On various occasions the Constitution has been treated as . . . an icon, and consequently it has acquired the character of one.

lions of schoolchildren as "Black DanT's" were. Is it any wonder, then, that public response to the Constitution must be measured out in pecks of ambivalence? Three examples of ambiguous messages emanating from public figures can help us to appreciate various aspects of this phenomenon.

- Ever since the years of the young republic, contemporaries have acknowledged a sharp division between the advocates of broad construction, represented by Alexander Hamilton and John Marshall, and the devotees of strict construction, represented by Thomas Jefferson and James Madison. We all know, however, that in 1803 when the Louisiana Territory beckoned, Mr. Jefferson, in order to buy the land from the French in the absence of a specific constitutional provision authorizing him to do so, brushed his constitutional scruples away and momentarily became a broad constructionist. Other champions of judicial restraint have become chameleons of judicial activism, and vice versa. These switches don't give the American people a very clear message so far as constitutionalism and public policy are concerned.
- On the eve of the Civil War, in 1860–61, Abraham Lincoln invoked the Declaration of Independence *and* the Constitution in order to deny that states of the Union retained a right of revolution. Jefferson Davis, an authority on the U. S. Constitution, proclaimed his devotion to that document yet argued the contrary. Although both arguments contained a degree of legitimacy, four years of tragic bloodshed resulted in a permanent union. Yet we are left with an anomaly in American political thought. An imperative that all good patriots defended in 1776—the right of revolution—was rejected with equal vehemence (and some casuistry) in 1861. More misunderstanding.
- In 1878 William E. Gladstone, the Liberal British statesman, proclaimed that "the American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man." Such a splendid compliment echoed through the pages of American history and civics textbooks for more than half a century thereafter. Meanwhile, however, those who bothered to examine Gladstone's remarks *in context* bitterly resented them because careful readers recognized what a left-handed compliment Gladstone had bestowed. Just look what happens when we restore the fifty-some words that actually preceded his grudging praise: "The two constitutions of the two countries express indeed rather the differences than the resemblances of the nations. The one is a thing grown, the other is a thing made. . . . But, as the British Constitution is the most subtile organism which had proceeded from the womb and the long gestation of progressive history, so the American Constitution is. . . ." American chauvinists did not care for the notion that their nation had been "struck off at a given time." They too wanted the legitimacy that historic experience and organic growth could confer. So an Anglo-American dialogue ensued for decades. It may have been stimulating for jurists and constitutional scholars; but it was neither edifying nor instructive for the public at large.

A different kind of confusion has arisen from the intermittent debate concerning the "intent" of the framers. Take, for example, the First Amendment's requirements for separation of church and state. Did the framers truly mean to prevent any form of prayer or meditative silence in public schools? We will never know; and we are no more likely to achieve a consensus on that matter than we are concerning the origins of the Second Amendment. Does "the right of the people to keep and bear arms" mean what the National Rifle Association contends? Historians and constitutional lawyers have strong reasons for skepticism. Nevertheless, we are unlikely to achieve unanimity on that issue either. That is why "constitutional response" really ought to be phrased in the plural. Americans have had multiple and varied responses to the United States Constitution. What else should we expect in a pluralistic society?

Anniversaries

How comforting it would be, at least, if an analysis of constitutional celebrations in United States history could shed crystalline light on the meaning of the document in our culture. On the eve of the 1937 Sesquicentennial, after all, James Truslow Adams declared that "the chief value of all anniversaries is perhaps that they make us pause and consider where we stand." The anniversaries of our Constitution, however, have not achieved that result.

Consider the Golden Jubilee in 1837. The nation had been exhilarated in 1826 when celebrating half a century of Independence. Eleven years later, however, little happened. Not many people even knew very much about the origins and character of the Constitution. Because the framers who had been present in Philadelphia took a fifty-year oath of secrecy, only the publication of Madison's *Notes of Debates* in 1840 exposed the intentions, frustrations, and above all, the compromises that had taken place in 1787. So three years after the Jubilee the American people finally learned in detail, if they had ever entertained any doubts, that the framers were not of one mind. But the fiftieth anniversary in 1837 had provided almost nothing in the way of fresh information or understanding.

The next major anniversary, the Centennial in 1887, barely avoided becoming a fiasco. President Cleveland eventually attended, though he did so reluctantly. Congress refused to appropriate a penny of federal support, and many dignitaries declined to appear. Chauvinistic and affluent Philadelphians—encountering widespread apathy—made the Centennial a fun party for locals and tourists, but also for pickpockets and thieves from metropolitan centers along the eastern seaboard. A fine time was had by most; but the reasons had more to do with local pride and commericalism than with interest in, or knowledge of, the U. S. Constitution.

Then, after another quarter-century of quiescence, a "cult of the Constitution" flourished in the United States during the decade following 1919. Critics called it a "fetich," but advocates regarded it as an antidote to bolshevism, anarchism, and socialism. "Consitution Day" did so well that by 1923 it was expanded into "Constitution Week." Formal study of the document (which had never been very thorough) became a legally mandated part of the school curriculum in many states. States' rights enjoyed a kind of renaissance. Nevertheless, that "fetich" phase did less for American interest in constitutionalism than FDR's ill-starred Court proposal in 1937. Truth to tell, it's been that way ever since 1787. Genuine constitutional controversy gets the politicians talking about the document, gets the jurists explaining it, gets the journalists writing about it, and actually gets ordinary folks interested in it.

How, then, did the Sesquicentennial of 1937 compare with the hit-and-miss events half a century before? Clearly some progress had taken place. A congressional committee began planning several years in advance, with a stated mission that was as much educational as celebratory. Congress eventually appropriated almost $400,000. Nevertheless, not very many people cared. The high school essay and oratorical contests did not amount to much. Few homeowners installed the Shrine of the Constitution (a replica) that Representative Sol Bloom, Director General of the Sesquicentennial, urged Americans to acquire.

Franklin Delano Roosevelt's 'Court-packing' plan, however, announced on February 5, 1937, did provide the Sesquicentennial with a shot of adrenalin that it sorely needed. Public interest in the Supreme Court (and hence in the Constitution) remained intense

HAMILTON MADISON FRANKLIN
KING
1787
1937
UNITED STATES CONSTITUTION SESQUICENTENNIAL

The Constitution as a public issue is more likely to generate interest, concern, even knowledge, than the bland reverence that occurs when everyone lavishes mindless praise upon the document.

throughout 1937—thanks, though, more to FDR's political maneuvering rather than to a deep-seated American concern for the Constitution. The Court dispute became far more important than the planned commemorative events. Sad to say; but so it was.

There is a historical lesson to be learned from this pattern: The Constitution as a public issue is more likely to generate interest, concern, even knowledge, than the bland reverence that occurs when everyone lavishes mindless praise upon the document.

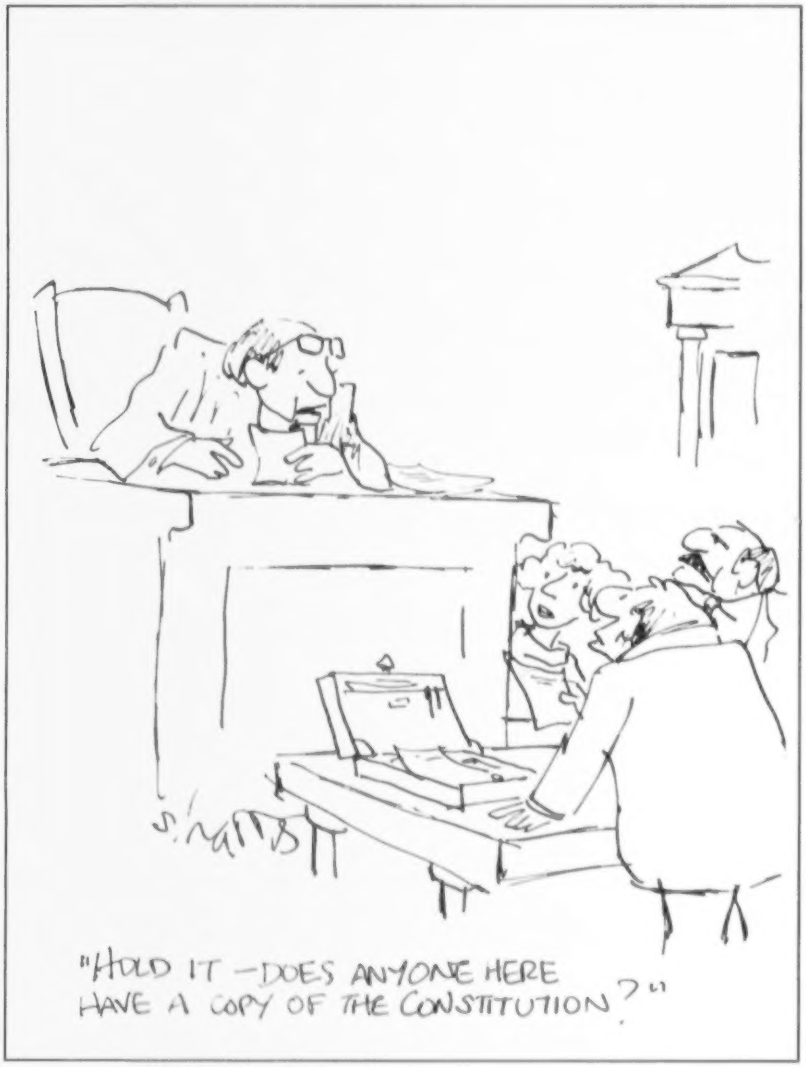
Ignorance and Confusion

In the half century since 1937 we've made some progress toward improved constitutional knowledge and understanding, but not a whole lot. Systematic public opinion polls came of age in the years immediately after 1937, and every so often the Gallup or Roper or Harris organizations asks a sizeable number of Americans how they view the Constitution, the Bill of Rights, or the Supreme Court. The opinions expressed are interesting, but they rapidly become depressing when we read the responses to questions asking Americans what they know. Late in 1943, for example, the National Opinion Research Center asked 2,650 Americans: "What do you know about the Bill of Rights? Do you know anything it says? Have you ever heard of it?" The replies ran as follows: 23 percent identified it or stated some part of it correctly, 7 percent identified it incorrectly but had some idea "of the spirit of the thing" (e.g., as part of the Declaration of Independence, or including "free enterprise, free to do as you please, etc."), 39 percent said that they had heard of it but could not identify it in any way, 4 percent identified it utterly incorrectly, 4 percent gave a response that was partially right and partially wrong (e.g., freedom of speech, press, fear, and want), 20 percent had simply never heard of it, 3 percent gave vague responses ("I'm not certain," "Can't say," etc.). The results and proportional percentages in that particular poll were by *no* means the low point between 1937 and the present.

Ignorance of the Constitution still remains a critical problem, and it can be found in some very high places. During August 1986, for example, when the Senate Judiciary Committee held hearings to assess the qualifications of Chief Justice Rehnquist and Associate Justice Scalia, partisan bickering broke out between Republican and Democratic senators. One Republican senator directed quite a tirade against the whole process of confirmation in general and against the Democrats in particular. Toward the end, as he ran out of steam, the senator asked with a bombastic flourish: "Who appointed us the scorekeepers? Who appointed us the judge?" Whereupon a fellow senator responded with quiet disdain: "The Constitution appoints us." Ignorance, as they say, is no defense.

Constitutional questions continue to be presented to the American public in perplexing ways. Let me demonstrate by means of five illustrations:

- Does the Bill of Rights apply to the states? Between the 1920s and the 1960s we moved steadily, albeit in a piecemeal fashion, in that direction. In a 1947 dissenting opinion (based upon his understanding of the Fourteenth Amendment), Justice Hugo Black claimed that it did apply, and that had become the majority view by the time he died in 1971. Today, however, the Department of Justice would like to challenge that development. The result, surely, is constitutional uncertainty rather than clarification.
- To what degree does the U. S. Constitution protect an individual's right to privacy? Or should it? The Supreme Court has responded positively to that question in sustaining the sale of contraceptives (1965), the right to view pornographic films in one's home (1969), and a woman's right to have an abortion (1973 and 1986), but negatively concerning the right of consenting adults to perform homosexual acts in private (1986). In so far as privacy remains contested as a constitutional right, and in so far as the concept is applied in an inconsistent manner, public confusion about the character of our constitutional rights will persist.
- Congress has the power to determine the spheres of the Supreme Court's jurisdiction. Most Americans are not aware that Article III, section two, specifies: "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." Those phrases make it possible, however, for persons or groups who are unhappy with the Court's decisions to urge Congress to strip the High Court of its authority in certain areas. 'Court strippers' have been especially vociferous on the subjects of abortion, school prayer, and affirmative action. Is this what the framers had in mind when they wrote the words quoted above? If we concede that we do not know, are we willing to leave the prospect of 'Court stripping' to caprice, to ideological and political changes of climate?
- If two-thirds of the states call for a constitutional convention, then one must be convened. How many


"HOLD IT — DOES ANYONE HERE HAVE A COPY OF THE CONSTITUTION?"

Americans know that 32 of the requisite 34 states have now made such a request? No one can really envision what would happen if two more states did pass such a resolution because we have had no additional conventions since 1787. What limits are there to the actions that a modern convention might take? Could the Supreme Court declare any of its actions unconstitutional? That is unclear.

- Finally, what should the role of the media be in American constitutionalism? Could they play a much needed educational role, for instance, if the Supreme Court consented to permit its public proceedings (cases argued before the Court) to be televised?

Does the press behave irresponsibly when it seeks advance information about forthcoming decisions of the Supreme Court and then 'leaks' such information prematurely, as ABC-TV did on June 15, 1986, in the case of the Gramm-Rudman-Hollings Act? Does not the press behave irresponsibly (and increase public confusion) when it runs such misleading headlines as "COURT DECLARES SODOMY ILLEGAL." The Court had not done so; it declared that individual states had the right to pass legislation concerning sodomy as they saw fit. The majority opinion in *Bowers, Attorney General of Georgia* v. *Hardwick, et al* (June 30, 1986) may have been inconsistent with previous rulings; but sensational journalism only made a confusing situation worse.

Supreme Court Justice Felix Frankfurter once noted that the purpose of an opinion was "to educate the public." He admitted, nevertheless, that *he* wrote "in the first place, for the law teachers." His candor does not compensate for his elitism. In my view, when those who are best qualified to educate the American public on constitutional issues finally begin to do so in a sustained and consistent manner, we may start to achieve the sort of informed and involved citizenry that the framers believed to be essential for the maintenance of American liberty.

The televised hearings concerning the Iran/Contra scandal and the controversial nomination of Judge Robert Bork to the Supreme Court inspired the national debate about the meaning of the Constitution that planners of Bicentennial programs sought but could never themselves have produced; we might have predicted such an outcome after examining the historical pattern of constitutional celebrations. But such intermittent interest does not create a dependably informed citizenry.

And we need to have an informed citizenry. William Penn pronounced the most enduring lesson very well during the 1680s in his preface to the *Frame of Government of Pensilvania [sic]*: "Governments, like clocks, go from the motion men give them; and as governments are made and moved by men, so by them they are ruined too. Wherefore governments rather depend upon men than men upon governments."

Michael Kammen, professor of history at Cornell University, is the author of *A Machine That Would Go of Itself: The Constitution in American Culture* (1986), which received the 1987 Francis Parkman Prize and the 1987 Henry Adams Prize for the most distinguished work of American history published in 1986.

Why Criticize the Constitution?

by DONALD L. ROBINSON

Toward the end of the second chapter of *On Liberty*, John Stuart Mill considers what happens to opinions in the absence of discussion. Almost all doctrines and creeds, he writes, pass through a cycle. They begin full of meaning and vitality in the hearts of those who originate them and in their direct disciples, and they retain that vitality "so long as the struggle lasts to give the doctrine or creed an ascendency over other creeds." As soon as it prevails, or its progress stops, controversy flags, and the doctrine takes its comfortable seat as a received opinion.

At that point, the place of the opinion in the lives of its adherents is transformed. "Instead of being, as at first, constantly on the alert either to defend themselves against the world, or to bring the world over to them, they have subsided into acquiescence, and neither listen, when they can help it, to arguments against their creed, nor trouble dissentients (if there be such) with arguments in its favor. From this time may usually be dated the decline in the living power of the doctrine."

Mill's example is Christianity, whose adherents, he says, no longer accept the ethic of the Sermon on the Mount as a living, compelling imperative, but rather honor it as something which "they have always heard lauded and never discussed." It is, he says, no longer a "living belief which regulates conduct."

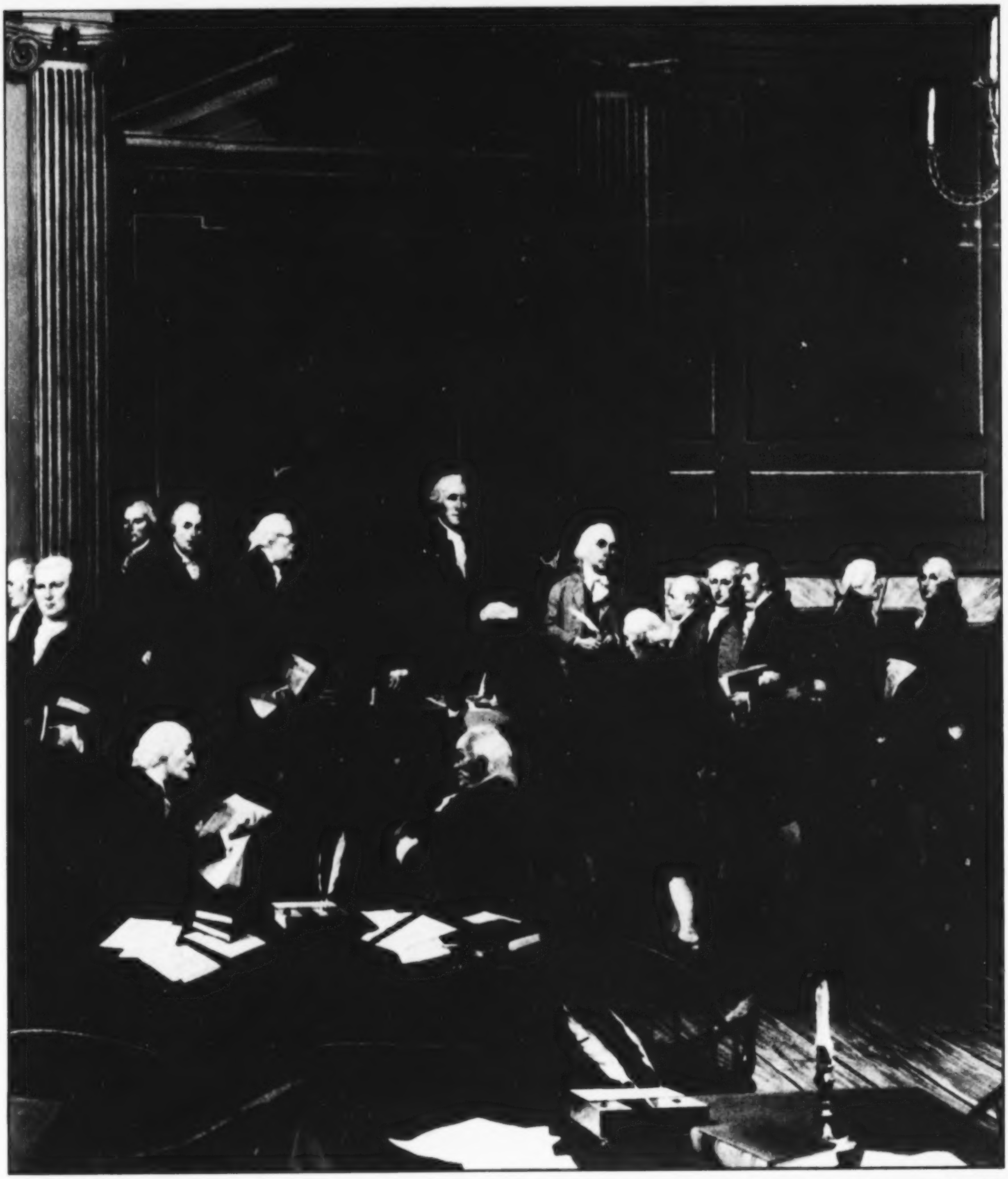
One cannot read this analysis without realizing its relevance to the doctrines of constitutional liberty in America. To the founding generation, these doctrines were literally fighting words, well and deeply understood, not just by the fifty-five framers, but by the many thousands of farmers, craftsmen and small-town lawyers who took part in town meetings and ratifying conventions that made a Constitution out of the document produced in Philadelphia. Their spirits were quickened by the brand new thing they were causing to happen. As Madison himself noted with wonder a few years later, the American Constitution was not, like other constitutions, a grant of liberties by a ruler to the people, but a grant of power by the people, creating government. John Marshall in 1821 (*Cohens* v. *Virginia*) took this point a crucial step further when he wrote that "the people made the Constitution, and the people can unmake it. It is the creature of their will and lives only by their will." (Compare the words of Charles Evans Hughes, who declared in a speech at Elmira, New York, in 1908, "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.")

As the American nation has matured, we have grown timid about criticizing the Constitution. There are many reasons for this reticence. We appreciate the system's great virtues: its encouragement of government by discussion; its success in taking us through past travails; the prosperity we have enjoyed and the progress we have made toward the goals set out in our Declaration of Independence. We regard the Constitution as "given" to us by a benevolent providence, acting through a generation of demigods, and we doubt that we can recreate the propitious circumstances that led to its creation in 1787, beginning with a convention that deliberated in secret for almost four months. We fear that, if we countenance the idea of revision, we will open an opportunity for those who want to repeal or destroy those features we regard as most crucial to our way of life.

Besides, revising the structure of the Constitution seems virtually impossible. A single legislative chamber in just thirteen of the fifty states can block any amendment. It is almost unimaginable that a serious structural revision could obtain the needed consensus. Thus thinking about revision is "academic" in the worst sense—a charge against their work to which most academics are particularly sensitive. Why gather wool thinking critical thoughts about the Constitution when there is serious political work to do?

There are several answers to these points. The first comes from the example of the framers themselves. They did not hesitate to undertake their second revolutionary act in a single generation when they perceived that the promise of effective self-government was slipping away from them. Nor did they flinch before the odds against success. Ratification by all thirteen states, as required by the Articles of Confederation, was quite simply impossible for so fundamental a revision as the leading framers contemplated, but they went ahead anyway, designing a system that conformed as nearly as possible to the nation's principles and that met its needs, and trusting that, if they could find real improvements, they would be able somehow, in due course, to summon the political will to put them in place.

Finally, the best argument for encouraging critical constitutional studies is John Stuart Mill's. We have departed far from the framers' design. In the use of "war powers," in the creation of political parties that monopolize the road to the White House and the procedures of Congress, in the administration of monetary policy by an appointed agency that exercises fused powers, and in countless other ways, we have departed radically from the



"Signing of the Constitution," by Louis S. Glanzman (center segment). Commissioned by the Pennsylvania, New Jersey, and Delaware State Societies, Daughters of the American Revolution. Photographic reproductions are available from the Eastern National Park and Monument Association, 1-800-821-2903.

teachings of the men who founded our constitutional tradition. We may, in some cases, have improved on their work. Still, we are loath to criticize it explicitly or to suggest that it be revised. The result is that their principles slumber. We have very little discourse with other nations about comparative constitutional traditions. We cannot even figure out how to induce our children to take a lively interest in constitutional questions.

That is the central challenge of this Bicentennial era: to quicken our faith in constitutional liberty by encouraging a wide-ranging discussion—one that dares to be critical.

Donald L. Robinson is professor of Government at Smith College and author of "*To the Best of My Ability*": *The Presidency and the Constitution*. He was the first director of Project '87 (1977–78).

Our Constitutional Future

BY JAMES OLIVER HORTON

In the 1983 inaugural issue of this journal, James MacGregor Burns and Richard B. Morris posed "thirteen crucial questions" which the advisors and participating scholars of Project '87 identified as central to a discussion of America's Constitution during its Bicentennial years. These questions were selected to promote broad ranging inquiry into the issues which have shaped our present constitutional form over the nineteenth and twentieth centuries:

1. Are the limits placed on the federal government's powers by the Constitution realistic and enforceable?
2. Is the Constitution maintaining an efficient and realistic balance between national and state power?
3. Are the courts exercising their powers appropriately as interpreters of the Constitution and shapers of public policy?
4. How can republican government provide for national security without endangering civil liberties?
5. How can republican government protect its citizenry and yet uphold the rights of the criminally accused?
6. What kinds of equality are and should be protected by the Constitution and by what means?
7. Does the Constitution adequately protect the rights of women?
8. Does the Constitution adequately protect the rights of blacks, native Americans, ethnic groups, and recent immigrants?
9. Does the President possess adequate power—or too much power—over war making and foreign policy?
10. Does the constitutional separation of powers between the President, the Congress, and the Judiciary create a deadlock in governance?
11. Does the evolving constitutional system, including political parties and interest groups, strengthen fair and effective representation of the people or undermine it?
12. Can the Constitution be utilized more effectively to provide economic security and promote the well-being of all Americans?
13. Should we make changing our fundamental charter of government simpler and more democratic?

During the intervening four years since its appearance, *this Constitution* has presented articles addressing these issues both historically and within the context of contemporary American society. They were offered as contributions to the ongoing constitutional discussion, quickened and more concretely focused by the Bicentennial celebration. These thirteen questions offered a reasonably broad framework for the current public conversation on the Constitution; looking toward the future, however, we might wish to reflect on those issues likely to be the appropriate constitutional questions for the next century.

In an effort to sample the opinion of a range of American scholars on this question, Project '87 surveyed over four hundred social scientists, historians, constitutional scholars, and political and educational leaders, asking that they suggest those questions that might be the crucial constitutional issues of the next hundred years. There were one hundred and forty six replies ranging from cryptic notes to complex essays. The thirteen crucial questions posed by Burns and Morris five years ago remained central points of concern, although with additions and revisions. Among these varied, if unrepresentative, responses interesting patterns do emerge, which may help to provoke further study and discourse.

National Powers

The single most important issue for those responding overlapped several of the thirteen questions. Respondents, obviously influenced by the current political climate, focused on the balance and control of national power. Of central concern was the impact of covert actions, unofficially pursued by agencies of the federal government, on the ability of Congress and the administration to work as co-equals in shaping of American foreign policy. More specifically, many wondered about the effect of such actions on the ability of the branches of the federal government to cooperate in their responsibilities to make war or to pursue peace. Historian Harold M. Hyman of Rice University spoke for many when he speculated that "the questions of covert diplomacy and war powers in an undeclared war/terrorist situation will redefine the very nature of acountability."

Several suggested that this question might be addressed constitutionally. Political scientist Nathan Hackman, of the State University of New York at Binghamton, argued that recent difficulties in interpreting the War Powers Act and the revelations of CIA and National Security Council "excursions" into Latin America and the Middle East "suggest a need for constitutional tightening." Traditional tensions within the federal government have been and will continue to be complicated by the technological revolution in weaponry and intelligence gathering which has outpaced the ability of the legislative branch to monitor the activities of the executive.

Many, like Joseph F. Wall, historian from Grinnell College, are convinced that covert efforts such as those brought to light during the Iran-Contra hearing will become more difficult to control without a clear constitutional ruling on the role and obligations of each branch of government in prohibiting such private, non-official covert activity. "The concern expressed by Arthur M. Schlesinger, jr., in respect to the 'imperial presidency,' and William Fulbright for the 'arrogance of power' " Wall warns, "will not necessarily disappear along with Ronald Reagan from the Oval Office."

Technology

The concern with the difficulties of the balance of power within the federal government was a corollary of a more encompassing concern with the "technological revolution" currently underway and assumed to be accelerating in the next century. Significantly, none of the "thirteen crucial questions" explicitly delineated technology as a major issue for constitutional debate. Surely technological progress was cause for such debate during the first half of the twentieth century, but it did not dictate the social and political setting then as it is expected to do in the future. Over two-thirds of respondents agreed that whatever the individual issues of constitutional debate in the next century, the discussion will be complicated by the explosion of technology in all areas of national and international life.

Instant communications and rapid transportation of people and material will continue to bind our national economy and, increasingly, our political policy making to the rest of the world. Indeed, most believed the international setting will become increasingly important for constitutional interpretation. Thus, the question of constitutional limits on federal power will take on broader implications.

Beyond the impact of the growing sophistication with which society can destroy itself, respondents listed the constitutional questions of privacy which will become far more extensive than simple wiretapping and video observation. As the techniques for public surveillance improve, some raise the spector of "big brother" while others see the prospect of more efficient and more reliable information gathering for critical social and economic planning. One political scientist, David Caputo of Purdue University, worried that "technological advances [would] make the excesses of '1984' more possible, [and would continue and increase the] tensions between individual rights and societal authority." Yet, he was also hopeful that technological advance would bring the cures and preventions of disease and addiction.

A number of scholars looked at the implications of technology for the issues of individual rights. Race, gender, and class issues remain central constitutional concerns but respondents suggested that they might be complicated beyond our contemporary understanding by the progress of bio-technology. Historian Joseph R. Morice of Duquesne University and political scientist G. Allan Tarr of Rutgers University were among those who suggested that we have only begun to confront the issue of artificial insemination, organ transplanting, or surrogate parentage as constitutional issues. Although many thought that abortion would remain a controversial constitutional question for the foreseeable future, several also saw euthanasia becoming more a subject of debate.

Pushing biology to its contemporary outer limits, there was considerable speculation on the constitutional implications of genetic engineering and the manipulation of human life material. This concern expands and complicates earlier questions about constitutional protections of racial and gender rights. How does constitutional interpretation deal with the question of the creation of life and the possibility of what political scientist Carl P. Chelf of Western Kentucky University referred to as a "super race"? Surely within the next decade, the makers and the interpreters of national law will be forced to deal with the question of who will be allowed to determine which genes can be distributed to whom and who can make decisions about the gender selection of un-born children.

These issues embrace several individual constitutional concerns, including privacy, property, even possibly license and patent rights. But of equal import are the ethical questions underlying traditional American attitudes about race, class and gender. How can the Constitution guide governmental authority in deciding which genes are worthy of preservation, or which should be altered? As a number of respondents wondered, what will be the constitutional meaning of individual rights when individuals might be brought into existence through "scientific" rather than biological means?

Equal Protection

This latter issue was linked to more conventional concerns for equal protection of women's rights. Several expressed apprehension that conservative courts have already shown signs of limiting the application of Fourteenth Amendment protections in the areas of gender discrimination. The recent administrative court decision involving a suit brought by female graduate students against all-male dinner clubs at Princeton University is viewed as an alarming signal. This decision allowed these clubs to retain their discriminatory policies by dissociating from the university and establishing themselves as "private clubs" beyond the reach of equal protection requirements.

Others speculated that such private status would be used to continue the maintenance of racial and gender discrimination and separation. The question of the Supreme Court's ultimate ruling on public subsidies to private education was seen as a significant issue in this regard. While most believed that gender and racial discrimination would remain important considerations for constitutional interpretation into the next century they seemed to see these issues broadening beyond specific issues of *de jure* or *de facto* discrimination common in the twentieth century. Increasingly, family violence, child custody, parental responsibilities in alimony and child support payments will be viewed as both racial and gender issues and they will center the discussions of the rights of black and white women. The role of government in assuring child care and medical care will also become a larger issue for constitutional consideration, broadening again issues of the protection of the rights of minorities and women.

While some worried about what they perceived as the conservative agenda of the current Supreme Court, others believed that despite its ideological right turn in recent years there will be major reinterpretations of constitutional phrasing which will have a liberalizing affect on the application of the Fourteenth Amendment. Several respondents believed that there will be a radical reinterpretation of the meaning of the term "equal protection" in the coming decades. "Just as the 1920s and 1950s were each followed by more than a decade of extensive liberal reform," political scientist Janet K. Boles, of Marquette University predicted, "so will the coming century be ushered in by a return to concerns with the pervasive inequalities among the population based on race, gender, and ethnicity."

Boles was but one of a number who believed that we would see a "coming 'egalitarian revolution' [which] will be characterized by a far greater commitment to group-based, or collective, equality." In light of affirmative action stands recently reaffirmed by a more conservative court, she believed that constitutional questions of fairness will be informed by the recognition that "some groups must be treated differently in order to be treated equally." Such a reinterpretation would have special significance for efforts to redress imbalances in educational and occupational opportunities and in providing equal access to health care and other social services to the poor.

Many, less optimistic than Boles, feared that the question of equal access could not or would not be successfully addressed in the near future. Harry M. Clor, a political scientist from Kenyon College, pointed out that in the recent past the Supreme Court has shown no "coherent philosophy or body of principles" on the question of how and to whom the principles of affirmative action ought to be applied. He further suggested that this dilemma is likely to continue for several decades. This concern was deepened by others, expressed by Susan Leeson, of Willamette University for example, that the impact of a non-expanding "political/economic pie" will intensify debate over the meaning of equality and constitutional equal protection guarantees, making the issues even more politically difficult.

There were numerous other concerns more difficult to group. They covered all the broad areas outlined in the thirteen crucial questions suggesting a predictable connection between the last hundred years and the next. Constitutional readings on criminal rights and a host of civil liberty issues, ranging from protection of the right of political protest to academic freedom, freedom of the press or other free expression, were seen as continuing questions. There was significant speculation that church-state separation issues would remain controversial but that the Court's position would not change much from its current stand which has recently reaffirmed its view that the Constitution prohibits state sponsorship of or interference in religious prayer or other practices.

International Relations

Perhaps more interesting than the specifics of respondent speculation on constitutional issues was the fact that almost all such speculation recognized implicitly or explicitly that future interpretations would take place in a world different from that which Americans have experienced in the past. The historical experience of America has been one of international ascendancy. Except for a few precarious decades at the beginning of our national life, we have been a nation on the rise. As our international economic and military strength and influence grew during the first half of the twentieth century, our international position had a profound effect on our interpretation of our Constitution. It was no accident that the Supreme Court lent constitutional sanctions to white supremacy at home while American economic dominance over the colored peoples of the Caribbean, Latin America and the Pacific was being rationalized as aid to our "little brown brothers."

The international situation of the mid-twentieth century made constitutional support of American racism inappropriate to the "Cold War" competition. Post 1940s America was no longer isolated from the world which was rapidly changing with the emergence of independent third world nations. When the Supreme Court struck down the concept of "separate but equal" it was partly an explicit recognition that when American "democrats" competed with Russian "communists" for the loyalty of the third world, constitutionally-supported racism created an American disadvantage. In a less direct way, America's women's rights movement benefitted from comparisons with occupational diversity among Soviet women widely touted during the 1950s and 1960s.

Future interpretations of the Constitution will be rendered in the context of dramatically shifting international relationships. The United States is experiencing unprecedented challenges to its economic and political world dominance. While we have been building our military arsenal to a level the present administration argues is competitive with that of the Soviet Union, it may well be that our most significant competitor will not challenge with missiles and submarines but with VCRs and compact disks. As the United States finds itself pressed, even "outclassed," economically the call by those who demand that American military strength be used to redress the balance of power may grow louder and more influential. As the economic and political emergence of Japan, Korea, China and other Asian nations dictate changing international relationships, Americans will be forced to accept a place of parity among the peoples of the world. This task may not be an easy one for those used to seeing themselves, their country and their culture as superior to the "colored peoples" of the world. American reaction may test constitutional restraint on the international use of military force.

Concerns over the increasing difficulty of maintaining a balance of power among the branches of the federal government take on immense significance under such circumstances. If administrative officials can rely on "off the shelf" covert operations to circumvent congressional intent in international weapons trading in the 1980s, what constitutional measures will be needed to address such actions during the 1990s? Will the Constitution effectively control the temptation of one branch of government to resort to military power in the face of arguments that American political interests are under attack around the world by foreign economic power?

As we struggle to sort out the implications of the shifting balance of international economic power for American constitutional interpretation, the issue of governmental jurisdiction over American multi-national corporations will also become more pressing. In short, the United States Constitution will be called upon to guide international affairs as never before.

* * * * *

Although experts may be able to see with some clarity the central constitutional issues of the next decade or so, one is struck by the impossibility of looking beyond that point. Looking forward from the hot Philadelphia summer in 1787 it would have been easier for the prophetic observer to anticipate the constitutional crisis that precipitated a civil war, or the constitutional challenge posed by the growth of giant national corporations, than for us to look ahead to the next century. Economic, social and political trends barely visible now will surely complicate constitutional questions, perhaps beyond our understanding. And of course all this may be hopelessly complicated by the explosion of a technology that we cannot now comprehend.

Because of its dynamic quality, we can be optimistic that the Constitution will continue to satisfy the needs of our democracy in the twenty-first century. All of our respondents based their assumptions about the future on their faith in constitutional flexibility, echoing Franklin D. Roosevelt's interpretation: the Constitution was, he said, "so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form."

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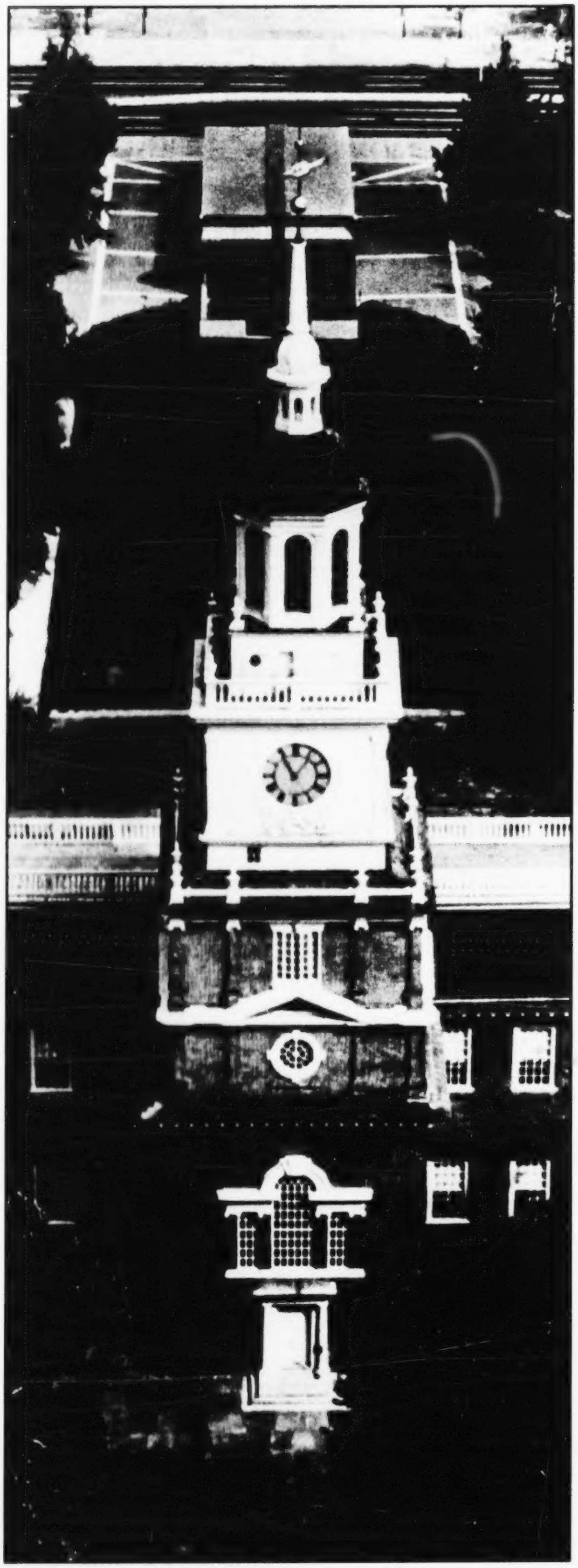
* The author expresses appreciation to Elsie Mosqueda for her valuable data entry assistance and insightful comments on this article.

Project '87 Survey Results

No.	146 respondents*
108	Distribution of power between branches of the federal government.
97	Technology, including bio-engineering, computers, communications, genetics, and medical technology.
66	Equal protection under the Fourteenth Amendment, including affirmative action, race and gender civil rights, and immigration policy.
61	Role of the Supreme Court in constitutional change and selection of justices. Concern about growing politicization of the Court.
53	Concern over economic matters, including federal spending levels, the national budget and the national debt.
41	Electoral process, including presidential selections and the growing role of political action committees, and the rising cost of political campaigns.
32	Separation of church and state
25	Environmental issues

* Most respondents discussed more than one issue, and those issues have been grouped here in a very general way to provide a crude indication of the concerns of those who participated.



Independence Hall, Philadelphia, PA.

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For the Classroom

Affirmative or Negative: THE BAKKE DECISION

This episode, which uses the Bakke decision of 1978 to stimulate student thinking about equal protection of the law, has been edited for inclusion in ***this Constitution****. It is one of 49 historical episodes in* Reasoning With Democratic Values: Ethical Problems in United States History *written by Alan Lockwood and David Harris and published in 1985 by Teachers College Press, Columbia University. Many of the issues involved constitutional values. Order forms and additional information can be obtained from Teachers College Press, Columbia University, 1234 Amsterdam Ave., New York, NY 10027; (212) 678-3929.*

Allan Bakke, *top row, second from left. School of Medicine, University of California, Davis.*

In 1973 Allan Bakke applied to the medical school of the University of California at Davis and was rejected. He decided to try again the following year. He had no idea that his ambition to become a doctor would divide the nation and make his name a household word.

Bakke had attended the University of Minnesota, where he majored in mechanical engineering and earned just under an A average. To help pay the costs of his college education, he joined the Naval Reserve Officers Training Corps. After graduation he fought as a marine captain in Vietnam.

Upon returning to the United States in 1967, Bakke earned a master's degree in engineering at Stanford University. He then took a job as an aerospace engineer at a National Aeronautics and Space Administration (NASA) research center in California. "I don't know anyone brighter or more capable," said his boss at NASA. Married, father of three children, and well paid, he seemed comfortably set in life.

What he really wanted, however, was to become a doctor. So determined was he that he took biology and chemistry courses required for medical school while working as an engineer. To make up the time missed from his job, he worked early mornings and evenings. Bakke also worked off-hours as a hospital emergency room volunteer. He took tough assignments working with battered victims of car accidents and fights.

He was 33 years old when he finally applied to medical school. All 12 of the schools he applied to, including the University of California at Davis, turned him down. He thought it was because of his age. Some of the schools said he was too old. Davis had been his first choice, because it was near his suburban San Francisco home. He soon learned that it was not because of his age that his application to Davis had been rejected.

Founded in 1968, the University of California at Davis Medical School had no intent to discriminate against minority applicants. Among the 50 students in its first class however, none was black, Hispanic, or Native American. To ensure minority representation in future classes, Davis instituted an affirmative action plan that reserved 16 of 100 places in its entering class for disadvantaged minority students, principally blacks, Chicanos, and Native Americans. Students accepted under the special admissions program had lower grade-point averages (GPA) and admissions test scores than the 84 students accepted under the regular admissions program. In 1973 the average GPA of special admissions students was 2.88 compared with 3.49 for regular students. On the Medical College Admissions Test (MCAT) the average ranking of special admissions students was the thirty-fifth percentile, whereas regular students averaged in the eighty-third percentile. GPA and MCAT scores, though not the only factors, were the major ones considered in screening applications under the regular admissions program.

Because Bakke was white, he was prevented from competing for the 16 places set aside under the special admissions program. His GPA and MCAT scores were higher than those of the students accepted under the special program. On the MCAT he scored in the ninetieth percentile, and his GPA was 3.51. Bakke believed that the special admissions program had kept him out of medical school.

In a letter to the chairman of the Davis admissions committee, Bakke expressed his frustration:

> I am convinced that a significant fraction of medical school applicants is judged by a separate criteria. I am referring to quotas, open or covert, for racial minorities. I realize that the rationale for these quotas is that they attempt to atone for past racial discrimination, but insisting on a new racial bias in favor of minorities is not a just situation.

After being rejected a second time, Bakke filed suit in California court claiming the university had unlawfully discriminated against him on the basis of race. He asked the court to order the university to admit him.

Bakke claimed that the Davis special admissions plan was *reverse discrimination*. His complaint charged that he was fully qualified for admission and that his application was rejected because of his race. He maintained that the university, as a result of its racial quotas, had denied him equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution.

In response, the university's lawyers argued that the racial classification in this case was permitted by law. Unlike illegal classifications of the past that were designed to *exclude* minorities, the Davis plan, it was claimed, placed minorities in a special category in order to *include* them. According to the university, this was a necessary corrective action to remedy the effects of past discrimination. More specifically, the university presented four reasons to justify its special admissions program:

1. To improve medical education by including men and women from diverse segments of society in medical school;
2. To reduce separation of minorities from the mainstream of American life by drawing them into the medical profession;
3. To provide role models for minority children to demonstrate that there were now opportunities open to them;
4. To improve medical care in seriously underserved minority communities.

The California court concluded that the program at Davis, by granting preference to minority students, violated the equal protection clause of the Fourteenth Amendment. The program was declared illegal.

Fearing that the ruling would invalidate all of its affirmative action programs, the university appealed the lower court decision to the California Supreme Court. The state's highest court upheld the lower court. It ruled that the Davis program violated the constitutional rights of nonminority applicants by granting preference on the basis of race. The Constitution, claimed the majority of the court, should be color-blind. One member of the court disagreed with the majority decision. He argued that it was a sad irony to find the Fourteenth Amendment aimed against blacks when its original purpose was to provide opportunities for former slaves.

Because a federal constitutional issue was involved in the case, the university could appeal to the U.S. Supreme Court. In September 1976, a final appeal was made to the nation's highest tribunal. Few Supreme Court cases in U.S. history stirred as much debate as *Regents of the University of California* v. *Allan Bakke*. The main issue to be decided was whether any government agency should be allowed to consider who was black and who was white in an attempt to overcome past discrimination.

On a crisp October morning in 1977, a huge crowd gathered on the Supreme Court plaza in Washington. The inscription above the monumental columns of the building read, "Equal Justice Under Law." There were differing opinions in the crowd about just what equal justice required in the case to be heard that morning.

At precisely ten o'clock, nine black-robed justices appeared from behind red velvet curtains and took their seats at the elevated bench. They were about to hear arguments in what was considered the most important civil rights case in a generation.

The justices would hear from the University of California's lawyer, Allan Bakke's lawyer, and the *solicitor general* of the United States. The solicitor general is the one who argues the position of the United States government in cases where the federal government has a special interest.

First came the university's case. The 16 minority places at Davis, argued its lawyer, should not be considered a traditional quota. In the past, quotas had been used to limit minority participation, but here they were used to increase it.

The university's argument included other points. Color-conscious admissions policies, its lawyer said, were necessary to bring minorities fully into the American mainstream. Without affirmative action plans, no more than a trickle of minority students would be admitted to professional schools. In addition, argued the university, society benefits from special admissions. Whites and minorities learn from each other, and minority graduates are more likely to practice in minority communities where there is a greater need for medical doctors.

Furthermore, merit alone—as reflected by grades and test scores—has never been the sole basis of selection for schools. If colleges and universities can select students on the basis of geography and athletic ability, why not add racial diversity as a criterion for selection, asked the university.

Next came the lawyer on behalf of Allan Bakke. He began by attacking quotas. He said the Davis program used a racial quota that allowed minority students to satisfy lower standards than white students. Racial quotas, he claimed, should not be permitted under the Constitution because they grant rights on the basis of ancestry and not on the basis of individual achievement.

Bakke's lawyer asked the justices whether there would be any limit on how high the quota could go. Could it be set, he wondered, at 32, 64, or even 100? Emphasizing the color-blindness of the Constitution, he argued that quotas should be unconstitutional even when minorities benefit from them: "The equal protection clause does not expand and contract depending upon the purpose behind racial discrimination." It was not fair, according to this argument, for Bakke to be moved to the back of the line because he was white.

Bakke's lawyer also pointed out that not all minority students are disadvantaged. There could be affirmative action programs that considered hardships faced by applicants, without using race itself as the measure for admissions.

The U.S. government's position was presented last to the justices. The solicitor general pointed out that Congress and the executive branch have permitted race to be taken into account in other matters. For example, special scholarships were offered for minorities, loans were reserved for minority-owned businesses, and companies with government contracts were required to hire minorities. These were temporary but necessary steps, he argued, to achieve racial equality.

Next, he maintained that the Fourteenth Amendment protects all persons without regard to race, but the lingering consequences of past discrimination must be addressed. As he put it: "The Fourteenth Amendment should not only require equality of treatment, but should also permit persons who were held back to be brought up to the starting line where the opportunity for equality will be meaningful."

Finally, the government's lawyer maintained that color-sensitive programs were fair. Minority students with lower test scores and grade-point averages, he said, may have as much potential to be physicians as whites with higher scores. The minority students have demonstrated the determination and ability to overcome hurdles not faced by whites.

The justices listened and questioned for two hours. Then they retired for months to reach a decision. Unable to reach agreement, they presented sharply divided opinions. It took 154 pages to express them.

Four of the justices decided the case on narrow grounds. They did not think the case required a decision based on the Constitution. For them, the laws passed by Congress were sufficient basis for deciding the Bakke case. In the opinion of these four justices, the university as a recipient of federal funds had violated the Civil Rights Act of 1964. That law prohibited programs receiving federal funds from excluding anyone on account of race. As one justice stated, "Race cannot be the basis of excluding anyone from participation in a federally funded program." They believed that the special admissions program was unlawful and they wanted Bakke admitted to the medical school at Davis.

Another four justices voted to uphold the Davis admissions program. They concluded that it violated neither the 1964 Civil Rights Act nor the Fourteenth Amendment to the Constitution. In their opinion, the California Supreme Court should be reversed. To support this view, one of the justices said: "In order to get beyond racism, we must first take account of race. There is no other way. In order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy."

Four justices do not make a majority on the Supreme Court. A majority of justices is required for the Court to render a decision in a case. The ninth justice, Lewis Powell, broke the deadlock. On the issue of Bakke's admission, he voted with the first four justices. On the issue of race-conscious affirmative action he voted with the second four justices. The compromise decision ordered Bakke admitted to the Davis medical school but allowed the university to consider race as a factor for admissions.

According to the decision, colleges and universities were permitted to take an applicant's race into account as long as they did not establish a rigid racial quota. What justified the use of race in college admissions, according to Justice Powell, was educational diversity. He claimed that minorities had something to contribute to higher education. Said the justice, "It is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this nation of many peoples."

Six years after first applying to the University of California Medical School at Davis, Allan Bakke was admitted. He graduated and became a physician.

The major sources for this story were:
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Eastland, Terry. *Counting by Race: Equality from the Founding Fathers to Bakke and Weber.* New York: Basic Books, 1979.
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ACTIVITIES FOR "AFFIRMATIVE OR NEGATIVE"

Reviewing the Facts of the Case

1. Briefly describe the special admissions program at the medical school of the University of California at Davis.
2. What were Allan Bakke's main arguments against the Davis special admissions program?
3. What were the major arguments of the university in defense of its special admissions program?
4. What were two points made before the Supreme Court by the solicitor general of the United States in the Bakke case?
5. How did Justice Powell strike a compromise in the Bakke decision?

Analyzing Ethical Issues

Many discrimination cases came before the courts as a result of the civil rights laws of the 1960s. These cases involved discrimination on account of age, sex, national origin, race, and religion. Some of these cases presented situations in schools, neighborhoods, or work places in which there were few or no minorities. The courts had to determine if minorities had been excluded intentionally. In other words, was there *intent to discriminate?* Such intent was sometimes not found. At the medical school of the University of California at Davis, for example, there were few minority students but no intent to exclude them.

Could each situation listed below have occurred if there had been no intent to discriminate? Why or why not? What evidence would establish an intent to discriminate? Answer these questions for each of the situations. For example:

> A college basketball team is all black.
> *Yes, the team could have been all black if blacks were the only or best players who tried out.*
> *Evidence of an outstanding white player who tried out but did not make the team would probably establish intent to discriminate.*

1. An elementary school is all white.
2. Only Jewish people live in a large apartment building.
3. All flight attendants working for an airline are female.
4. A trade union has no Hispanic members.
5. A public transportation system has no handicapped riders.
6. A fast-food restaurant has only teenage employees.

Expressing Your Reasoning

1. Should the medical school at the University of California-Davis have established its special admissions program for disadvantaged minority applicants? Why or why not?
2. Affirmative action programs have been adopted in a variety of places. State whether or not you think each of the following plans is fair. Present reasons for your positions.
   a. To correct admitted past discrimination against blacks, the Detroit Police Department adopted a plan to promote equal numbers of black and white officers. The plan involves two separate lists, one for black officers and the other for white. Promotions to lieutenant are made alternately from the two lists. The plan will continue until one-half of the police lieutenants are black. Blacks make up 63 percent of Detroit residents.
   b. Dade County, Florida, set aside 10 percent of its public works contracts for minority-owned firms. Blacks make up 17 percent of the Dade County population. At the time the new plan took effect, less than 1 percent of county construction contracts were with black-owned firms.
   c. In 1974, the Kaiser Aluminum Company and the United Steelworkers of America voluntarily agreed to a plan. It was designed to increase the number of black workers in skilled positions at the Kaiser plant in Gramercy, Louisiana. Kaiser had recruited minority applicants for skilled jobs since the plant opened, but few applied. Under the plan there was a training program for unskilled Kaiser workers. Fifty percent of the training positions went to blacks and 50 percent to whites. Some of the black workers selected had less seniority (years of experience) than some of the whites rejected. The plan was to continue until the percentage of blacks in the skilled work force was roughly equal to the percentage of blacks in the work force of the surrounding area.

Answers for Activities

OVERVIEW

The following section includes suggested answers for the *Reviewing the Facts of the Case* and the *Analyzing Ethical Issues* activities that follow the episode. In addition, for each *Expressing Your Reasoning* question, ideas are presented for the teacher to use in facilitating discussion.

Reviewing the Facts of the Case

Following each question is an answer or answers in parentheses that would indicate that students have understood some of the key details of the episode.

Analyzing Ethical Issues

Examples of acceptable answers are presented. Students may, of course, generate other responses that the teacher may judge to be equally acceptable. In all cases, it is important that students be able to explain the reasons for their answers.

Expressing Your Reasoning

The intelligent discussion of different points of view on these questions is central to the *Reasoning with Democratic Values* curriculum. Over time, such discussions significantly improve students' ability to express themselves, to recognize the complexity of ethical issues, and to develop carefully reasoned and well-defended positions.

One characteristic of good discussions is the presentation and evaluation of a variety of reasons in support of or in opposition to a particular ethical judgment. The discussion leader's job, in part, is to elicit the reasoning of students. Through discussion, these reasons are examined for their persuasiveness.

There will be times when students express only a few reasons. The teacher may then wish to present additional reasons for the students to discuss. Thus, after each *Expressing Your Reasoning* question, some reasons are listed that the teacher may present for discussion. The listed reasons are not intended to be the best possible reasons favoring or opposing a particular position. Instead, they reflect a range of possible reasons, some of which students will reject as inadequate justifications. In the course of the discussion, students should be asked to explain why they find some reasons persuasive and others inadequate.

Reviewing the Facts of the Case

1. Briefly describe the special admissions program at the medical school of the University of California at Davis. (The Davis special admissions program reserved 16 of 100 places in its entering medical school class for disadvantaged minority students.)
2. What were Allan Bakke's main arguments against the Davis special admissions program? (Bakke claimed the special admissions program established an unconstitutional racial quota and allowed lower entrance standards for minority students than for whites.)
3. What were the major arguments of the university in defense of its special admissions program? (The university argued that the special admissions program was designed not to exclude anyone but to include minorities who had been denied admissions in the past. The university also claimed that the special program provided a diverse student body, reduced segregation of minorities in society, offered role models for minority children, and improved medical care in minority communities.)
4. What were two points made before the Supreme Court by the solicitor general of the United States in the Bakke case? (The solicitor general argued that the government must sometimes take race into account as a temporary step to achieve racial equality, that the effects of past discrimination required measures to bring blacks "up to the starting line," and that some minority students with lower grades and test scores may have as much potential to become doctors as whites with higher scores.)
5. How did Justice Powell strike a compromise in the Bakke decision? (Under Justice Powell's compromise, the university was ordered to admit Bakke and was permitted to take an applicant's race into account so long as a rigid racial quota was not established. The justice thereby forged a majority decision by taking part of the conflicting opinions of the two disagreeing minorities on the Supreme Court.)

Analyzing Ethical Issues

Underrepresentation must be the result of intentional discrimination for it to be a violation of the Constitution. A way for each situation to have occurred with *no* intent to discriminate is presented first. Then, evidence that might establish an intent to discriminate is presented.

1. An elementary school is all white. (*No intent:* No blacks lived in the area. *Evidence of intent:* Blacks and whites lived near each other but were assigned separate schools.)
2. Only Jewish people live in a large apartment building. (*No intent:* Friends and relatives rented in the same building. *Evidence of intent:* Apartments were refused to non-Jews who wanted to rent.)
3. All flight attendants working for an airline are female. (*No intent:* No males had applied. *Evidence of intent:* Applications were not accepted from males.)
4. A trade union has no Hispanic members. (*No intent:* There were no Hispanics holding jobs encompassed by the union. *Evidence of intent:* Hispanics held the same jobs as union members but were denied union membership.)
5. A public transportation system has no handicapped riders. (*No intent:* Transit officials overlooked the special needs of handicapped riders. *Evidence of intent:* Facilities for handicapped passengers were removed from the budget.)
6. A fast-food restaurant has only teenage employees. (*No intent:* Only teenagers applied for the jobs. *Evidence of intent:* Adult applicants were not hired.)

Expressing Your Reasoning

1. Should the medical school at the University of California-Davis have established its special admissions program for disadvantaged minority applicants? (Reasons supporting the university's special admissions program include: It would help correct past discrimination; it would increase black membership in the medical profession; it might improve medical care in minority communities; it would create a racial diversity in the medical school; minority applicants have not had an equal opportunity to compete on admissions tests. Reasons opposing the special admissions program include: Those admitted under the lower standards of the special program may be less qualified to practice medicine; race has nothing to do with competence to practice medicine; the program discriminates against qualified whites; minorities might come to believe they can succeed only when given preferential treatment.)
2. Affirmative action programs have been adopted in a variety of places. State whether or not you think each of the following plans is fair. Present reasons for your positions.
   a. The Detroit Police Department adopted a plan to promote equal numbers of black and white officers. (Reasons supporting and opposing the Detroit Police Department affirmative action program are similar to those presented for the Bakke case. In Detroit, however, past discrimination against blacks in promotion of police officers was acknowledged by the Police Department. The Detroit program was upheld by a federal appeals court, and in 1984 the Supreme Court declined to hear an appeal.
   b. Dade County, Florida, set aside 10 percent of its public works contracts for minority-owned firms. (In 1984, a federal appeals court upheld the Dade County plan. The U.S. Justice Department argued that the Constitution gives Congress special powers to fashion remedies for past discrimination, but that state and local governments have no authority to award contracts on racial classifications. Dade County officials argued that there has been a lack of participation by blacks in the economic growth of the Miami area. The affirmative action plan, they claimed, would correct past and ongoing economic discrimination against blacks. The affirmative action program was established following civil unrest in the black Liberty City area of Miami. The U.S. Supreme Court refused to accept the case on appeal.
   c. The Kaiser Aluminum Company and the United Steelworkers of America voluntarily agreed to a plan to increase the number of black workers in skilled positions. (Unlike the other affirmative action programs presented, the Kaiser Aluminum plan in Louisiana involved an agreement between a private corporation and a trade union. It did not involve government action. The plan was challenged in court by Brian Weber, a white worker, who applied for but was denied a training program for skilled workers. Weber claimed the program unlawfully discriminated against him because of his race. Weber lost his case. The U.S. Supreme Court found that the Civil Rights Act was intended to improve job opportunities for minorities and that it did not prohibit a voluntary affirmative action plan designed to eliminate a racial imbalance. As students present their own judgments in the affirmative action cases presented, you may want to ask whether those judgments are based on equal opportunity, equal treatment, or equal result.)

Pro/Con: A Single Six-Year Presidential Term:

Pro

by CHARLES BARTLETT

It is a bold endeavor to make the case for a change in the Constitution that has brought us to where we are. But since human nature stays relentlessly the same, our best hope for improving the quality of our society lies in adjustments that promise to make the government more effective, more responsive to the broad and basic interests of the people.

And while we have 536 elected officials in the federal government, the framers set the three branches in such delicate balance against each other that the system functions best when the sitting president has managed to establish an empathetic relationship with the people. If this relationship does not exist, the federal government tends to wallow like a rudderless ship.

So we need to do what we can to enable the president of the United States to be, in Woodrow Wilson's words, "as big a man as he can be." And respected political leaders, including a majority of the past presidents, have been contending for over 150 years that we can give our chief executives a better chance to be strong, respected leaders with an amendment to the Constitution that will give them six years to serve and no more than one term.

The four-year term is actually less than that because the business of government is totally eclipsed in the fourth year, and in at least part of the third, by the scramble to determine who will be the next president. "The next presidential election looms always in advance," complained James Russell Lowell one hundred years ago, "so that we never seem to have an actual chief executive but a prospective one."

Few who have served in government would argue that the four-year term yields a newly-inaugurated president enough time to learn his job and set his policies, to build his associates into a team, and to earn the confidence of the people. The latter are inclined, after all, to believe that they live in a time when there are no statesmen, only politicians. When a first-term president attempts to take the issues to them, he is quickly and widely perceived as bent on building a base so he can be renominated and reelected. Public skepticism leaves him little chance to demonstrate that his great concern is to promote the people's true interest.

It is necessary, John Stuart Mill observed, "to judge political institutions by their effect upon human character." The present system compels the first-term president to behave as if he were still in pursuit of the office. And the odds are that he is—as Teddy Roosevelt observed, "any strong man fit to be President" will inevitably want the honor of a second term. And in the case of most first-term presidents (not all), the pursuit of the second term has become a diverting preoccupation.

This preoccupation is, as Grover Cleveland described it, "a most serious danger to that calm, deliberate, and intelligent political action which must characterize a government by the people." The British purist, Lord Bryce, said the preoccupation tempts presidents to maneuver for renomination by "pandering" to the active elements of their parties.

The preoccupation invariably diminishes the quality of presidential leadership and the resulting policy aberrations have caused great men of the past—Chief Justice John Marshall, Sen. Harry Clay, Sen. Ben Wade, Sen. Thomas Benton, Sen. Charles Sumner, Sen. George Norris, Sen. Everett Dirksen, and Sen. Mike Mansfield—to urge adoption of the single six-year term.

Walter Lippmann long ago noted that elected officials tend, especially in matters involving foreign policy, "to make the big mistakes that public opinion insists upon." It is reasonable to ascribe much of the tragedy of Vietnam to the anxiety of three presidents—John Kennedy, Lyndon Johnson, and Richard Nixon—to be reelected. The aborted mission to rescue the hostages in Iran, our humiliation in the desert, was clearly attributable to President Carter's reelection concerns.

Proponents of the change are sometimes charged with wanting to take the president out of politics. Leadership really is politics under our system and the single-term president will still be earnestly engaged in seeking public and Congressional support for his policies. He will be a political activist on behalf of moves to improve the state of the nation but he will not be maneuvering for personal advantage. This is why the change will bring him added strength and credibility as a leader.

Some say the reelection campaign is healthy for the president because it exposes him to the people. It can certainly be dangerous: there have been six armed attacks on presidents in the past 18 years. Security precautions have transformed the travelling presidential party into a cocoon in which the president and his aides are virtually sealed as their aircraft shuttles from airport to airport.

The campaign has become more of an exercise in the over-simplification of complex issues than a learning experience. And some of these over-simplifications become restraints on the policy options in the second term. It would be hard to argue that the welfare of the nation is advanced by what a president learns or says in the course of struggling to be reelected. It is true instead that many presidents have tended to obscure, even to distort the realities of our situation, foreign and domestic, as they take their case to the people.

Some say Americans should not be denied the right to place anyone they choose in the White House and keep that person there as long as they want. But our entire system of government is a series of restrictions which the people have been willing to accept in order to secure effective and just management of their affairs.

"I readily engage with you in the arduous but pleasing task of attempting to make a nation happy," President George Washington told the senators in his first official meeting with them in 1789. A great problem with first-term presidents is that they give the people what they want to make them happy but they can put off the real solution to problems, the ones that require sacrifice, until after they have been reelected.

These are days in which we need leadership with a long, steady perspective. We need presidents who can, by being credible and forthright, assist the people in thinking through the dilemmas of the time. We will have far better hopes of securing this kind of leadership if we rescue our presidents from the reelection fever that pervades Washington at all times.

Charles Bartlett is the president of the Jefferson Foundation.

Con

by THOMAS E. CRONIN

Our four-year term for presidents has served us remarkably well. American voters have by and large made prudent decisions every four years. It's good for presidents, and for the general public, that after three and a half years, presidents are forced to get out of the White House and listen to real people and hear about *their* concerns, wants and aspirations for the Republic. The controversial constitutional amendment for a lengthened presidential term would create more problems than it would solve and should be rejected.

First, a six-year nonrenewable term would give us two more years of the "clunkers" or two years less of the truly outstanding presidents. Do we really want two years more of the Hardings, Pierces, and Buchanans and two years less of the Washingtons, Roosevelts, and Eisenhowers? Our present system provides for getting rid of ineffective presidents at the end of four years.

Second, four years is long enough for the American voter to decide whether a president is doing the job and if the incumbent deserves reelection or rejection. Supporters of the six-year term say presidents need more time to process their policies. Sweeping policy changes, to be sure, may take four years or even longer, yet four years is enough time for a president to demonstrate initial success or to persuade the public of the merits of key policies. Lincoln, FDR and Reagan, for example, all were able to make their case before the fourth November rolled around. Voters don't demand instant results. But surely, near the end of the fourth year, major program initiatives of a first-term president should be able to stand the test of close voter evaluation. The six-year term would release presidents from the desirable test of submitting their records to the voters.

Third, a president can seek reelection and still be a creative, effective full-time president. If Lincoln could run again in 1864 and Roosevelt in 1944, other presidents should also be able to face the voters. Frankly, the best way to campaign for reelection is to be a first-rate problem-solving president—doing the job, setting the directions, and shaping new policy strategies to the best of one's ability. The American voter can usually detect the phony or the misfit in the White House. They can usually judge whom to keep and whom to turn out of office.

If a president is doing the job reasonably well, and if there is no challenger on the scene who looks better, the American people will usually return the incumbent to office. If, however, the incumbent is failing to make the office work properly, people will question the performance and reject the incumbent. The important point is that a president doesn't have to campaign in every precinct. Presidents don't have to spend 20 or 30 percent of their precious time being a candidate. That argument is spurious. An effective president, who is doing the right things, needs only report to the nation and perhaps make a few swings around the major regions of the country. Television has helped tremendously to overcome the difficulty of communicating with the voters. Television allows a president to report directly to the "stockholders" of the nation.

Fourth, presidents *should be* guided by how the voters will judge them at the next election. Supporters of the six-year single term somehow think this is improper. In most instances, it is preferable to have a president be guided by voters' appraisal at the end of four years than by what a president alone thinks is best or by what he alone thinks will make him look good in the history texts. The accountability of the four-year election cycle forces presidents to achieve their most salient campaign promises. In a sense, our current system is an action-forcing process. It is a mid-term audit permitting the voters to judge whether a president has lived up to what he said he would do. Under a six-year term, Lyndon Johnson might have continued to escalate the Vietnam War until 1970. Under a six-year term, Richard Nixon might have left troops in Vietnam until 1974 rather than 1972. And as Arthur Schlesinger writes, "The nation saw the tempering effect of the desire for reelection on President Reagan in 1984. He dropped his earlier talk about the 'evil empire,' announced a heretofore concealed passion for arms control, slowed down the movement toward intervention in Central America, affirmed his loyalty to social security and the safety net and in other ways moderated his ideological positions." Under a six-year term, presidents might become removed from the public just as many U.S. senators who seem to forget whom they are representing.

Fifth, those who favor the six-year term do so in the vain hope we can remove the American presidency from politics. Yet the presidency is a political position and presidents at their best have to be shrewd politicians. Many of the supporters of the single term dislike the rough and tumble of contemporary American interest-group politics. They also seem to distrust the American voter. But politics in this country has always been a rough, demanding profession. Thus, presidents have to be politicians. To ask a president to rise above politics is like asking a bishop or rabbi to rise above religion.

The idea of trying to elect a nonpartisan national "city manager" is an illusion. A president has to be a party leader, has to be concerned with forming majorities. He should rightly be concerned with the possibilities of being reelected or turned out of office. Presidents must always be mindful that this is a democratic Republic and that ultimately they must be accountable to majority approval—and this is precisely what the hope of reeligibility helps to achieve. Reelection or defeat is a principal tool for keeping elected executive officials in touch with the people.

Finally, it is profoundly anti-democratic and undesirable to limit the discretion of the voters to choose who will rule them or represent them. In a system of limited powers an arbitrary tenure limitation is an imprudent way to limit power. Let the voters judge the ability of all our available candidates for executive office including the incumbent. Imposing a restriction on the freedom to reelect a president is to violate an essential principle of democracy, namely that voters have the right to exercise a free and uncensored ballot.

The Constitution should be amended only when there is clear and compelling evidence our Republic would be significantly improved by the proposed change. The notion that the six-year nonrenewable term for presidents would provide us with the leadership and governance we now lack is a suspect notion. Plainly, the arms race, tension with the Soviets, trade imbalances, and soaring deficits are the product of deficiencies in political leadership or political theories. These conflicts are not deficiencies of governmental structure. If most of these problems would continue under a six-year term, will the advocates of a lengthened presidential term be back a few years later advocating yet another constitutional amendment for an eight- or nine-year term?

The framers were right when they dismissed the idea of a single lengthy term. Four years is a long time. Let's remember one of the oldest sayings in American folklore: If it ain't broke, don't fix it.

Thomas E. Cronin is the McHugh Distinguished Professor of American Institutions and Leadership at The Colorado College.

The Genesis of Project '87

by RICHARD B. MORRIS

The initiative to sponsor a comprehensive reassessment of the American political system during the era of the Constitution's Bicentennial came from a proposal in March 1976 by James MacGregor Burns, then president of the American Political Science Association, adopted by a committee of the APSA chaired by Harold Lasswell. Recognizing the need to incorporate history into such a reassessment, Burns approached the present writer, at the time president of the American Historical Association, suggesting a collaborative effort.

Both association presidents had been actively involved in the scholarly side of the commemoration of the Bicentennial of the American Revolution. Both shared a sense of disappointment at the missed opportunities of that celebration. The tall ships were as a spectacle magnificent, and a deserving worldwide salute, but they did not convey to the American people the seminal contributions of the American Revolution. The word "revolution" was scrupulously avoided; while the Declaration of Independence was a focus of emphasis, the principle of equality explicit therein mysteriously disappeared. Instead, commercial exploitation vulgarized what should have been a great historic occasion.

The American Revolution Bicentennial as celebrated did not pose issues that involved the citizenry; the Constitution, on the other hand, in 1976 was already the subject of sharp contention over its interpretation and enforcement. The pathmaking decisions of the Warren Court involving civil rights, privacy, racial discrimination, reapportionment, and subsequent rulings concerning church-state relations and abortion, not to speak of the shadow cast by the Watergate scandal, raised major questions about the federal government's enlarged role under the Constitution. Already a movement was underway for a second constitutional convention.

Following a discussion in April 1976 the presidents of the two associations recommended to their respective councils a proposal for an interdisciplinary examination of the American political system, one which would take advantage of the ten-year lead time before the Bicentennial to implement a rigorous, realistic, and constructive program in order to promote citizen education and nationwide discourse. Upon receiving the approval and sponsorship of the respective councils, including authorization to secure funding, Project '87 was born.

A series of meetings were then initiated, beginning with one on July 27, 1976, at Columbia University, to prepare a proposal for several foundations. Attending the preliminary meeting, in addition to the two association presidents, were Benjamin R. Barber and Robert Curvin, representing APSA, and Patricia U. Bonomi and Michael Kammen, the AHA; also Ene Sirvet, associate editor of The Papers of John Jay, whose counsel, initiative, and organizing efforts greatly benefited the project. A proposal hammered out at that session for a one-year planning period was followed by a two-day "brainstorming session" on October 1–2 with several working papers commissioned. Present there, in addition to the above named, were Walter Dean Burnham, Samuel P. Hays, Herbert A. Johnson, and William E. Leuchtenburg. A one-year feasibility study was supported by an initial grant from the Ford Foundation and the Andrew W. Mellon Foundation, with a supplement from the Bicentennial Council of the Thirteen Original States Fund, Inc.

"The Signing of the Constitution," *26" high in bronze by Dennis Smith. For information, call 801-756-0333.*

Detailed planning was the basis of discussion on December 28, 1976, during the AHA annual meeting, where additional participants included Betty Glad and A.E. Dick Howard, with Evron M. Kirkpatrick and Mack Thompson, directors of the two sponsoring associations, *ex officio*. Consideration was given to the operation of Project '87 as an independent program. At a luncheon meeting at the Woodrow Wilson International Center for Scholars, Smithsonian Institution, with Burns presiding, the Center's director, James H. Billington, and his colleagues joined the discussion in exploring possibilities of a cooperative effort in areas of common interest.

In the weeks that followed, it was agreed that the two associations would assume sponsorship of the endeavor and that operations would come under the direction of a Joint Committee, co-chaired by Burns and Morris, with six members each to be appointed by the two association councils. Many eminent scholars have served on a rotating basis on the Joint Committee, and still others have been drawn upon for consultation, with special thanks due to the unflagging support of Ambassador Samuel R. Gammon of the AHA and Thomas Mann, until recently executive director of APSA. To enlarge the reach and to profit from the learning of members of the bar and other public personages, a distinguished forty-member Advisory Board was established, headed throughout the project by the Chief Justice of the United States, Warren E. Burger (now retired, serving as chairman of the national Commission on the Bicentennial of the United States Constitution).

To initiate the program, in 1977 Donald Allen Robinson of Smith College was recruited to serve as its director. He was followed for two years by Francis C. Rosenberger, former chief counsel of the U.S. Senate's Committee on the Judiciary. Since 1980, Dr. Sheilah Mann has provided imaginative and spirited direction. Dr. Cynthia Harrison has served as both deputy director and as editor of *this Constitution* (launched September, 1983), a quarterly published with the assistance of the National Endowment for the Humanities. In addition to grants from the NEH, the achievements of Project '87 have been made possible by generous funding from the Andrew W. Mellon Foundation, the Ford Foundation, the Rockefeller Foundation, the Lilly Endowment, Inc., of Indianapolis, Indiana, the CSX Corporation, the Exxon Education Foundation, and the A.T.&.T. Foundation, with core support from the William and Flora Hewlett Foundation.

The program of Project '87 was conceived of as three distinct but interrelated stages: the first three years to be devoted to fellowships and grants for independent research on constitutional subjects; the second stage to advancing the instruction of the Constitution in the field of education; and the third to engaging the public in discourse about the Constitution. As an intellectual framework, the project has kept the focus on "Thirteen Enduring Constitutional Issues," drafted in consultation with a broad spectrum of historians, political scientists, and lawyers.

The skillful direction of Sheilah Mann gave the project force and momentum necessary to achieve the numerous accomplishments of the decade. Project '87's program included six conferences and numerous sponsored articles focused on the enduring constitutional issues. In addition, fifty-one research grants and fellowships were awarded, a considerable number of which resulted in books and articles. Following the inaugural conference in September 1978, climaxed by a dinner meeting co-sponsored by the Friends of Independence National Historical Park and addressed by Senator Edward M. Kennedy, five other conferences were held: one at the Federal Judicial Center in Washington, DC, with a dinner at the Supreme Court hosted by the Chief Justice and others at Research Triangle Park, North Carolina; at Bloomington, Indiana; at Houston, Texas; and at Williamsburg, Virginia. Two of the most meaningful conferences occurred in 1987: the first at Philadelphia on the anniversary of the opening of the Constitutional Convention and devoted to the problem of the Constitution and the Courts, and the second at Williamsburg, Virginia, in October, dealing broadly with "Mr. Madison's Constitution." During three crammed days at the latter, unsettled issues were raised and critical problems concerning the contemporary functioning of the federal system were probed. The latter two conferences, it should be noted, were accompanied by public forums (videotaped for future distribution), sponsored jointly by the League of Women Voters Education Fund.

A highlight of Project '87's program has been teacher education, including a highly successful series of summer seminars for college teachers and the James Madison Fellowship Program for high school teachers. In recognition of their outstanding qualifications, Madison fellows are chosen to attend summer institutes where they have an opportunity to enhance their own education on constitutional studies and to learn about new and proven teaching techniques; they then return to their communities where they provide leadership on a variety of school and community activities in honor of the Bicentennial. In 1988, the Commission on the Bicentennial of the United States Constitution is providing support for a class of fellows. Because it provides a benefit to teachers, students and communities, the co-chairs of Project '87 hope that private or governmental agencies will continue to extend this solid and valuable effort.

Project '87's educational reach has been extended by *Lessons on the Constitution*, curriculum materials by John J. Patrick and Richard C. Remy. The poster exhibit on the American founding, entitled "The Blessings of Liberty," expertly directed by Joan R. Challinor, represented a signal success.

During its decade-long history, Project '87 never ventured to rewrite the Constitution nor to impose a monolithic interpretation of its critical issues upon the public. One could not expect conformity among scholars of standing and decidedly diverse views, even if such an idea had been tolerated. Project '87 did, however, assert a leadership role in having its representatives testify before appropriate committees of the House and Senate on three different occasions on the need to establish a federal presence in the commemoration.

The Constitution's Bicentennial has benefited by a rigorous scrutiny of that great charter; Project '87's efforts and like-minded programs throughout the nation offered many opportunities for thoughtful discussion. As Project '87 has ended, the Iran-Contra affair, the debate in the legislative branch over the deficit, and the charged discourse about the role of the judicial branch emerging in the hearings on the nomination of Robert Bork to the Supreme Court have prompted wide analysis of and argument over constitutional principles. If Project '87 has contributed even in a modest way to enhancing public understanding about the Constitution and the way it works, then all those who have participated in this venture merit the heartfelt thanks of its co-chairs. As a model of non-governmental initiative to explore the Constitution's significance and provide a scholarly reach to the public, Project '87 might well afford an example for closely contemporary Bicentennial occasions—the ratification of the Constitution, the establishment of the national government, and the adoption of the Bill of Rights.

Richard B. Morris is Gouverneur Morris professor of American history emeritus at Columbia University, editor of The Papers of John Jay and co-chair of Project '87.

Bicentennial Gazette

Resource Update

Educational Materials

CELEBRATING THE CONSTITUTION: A TEACHER'S GUIDE (updated). Books, map, biography cards, documents, posters: $23.00. Friends of Independence National Historical Park, 313 Walnut Street, Philadelphia, PA 19106; 1-800-821-2903.

LESSONS ON THE NORTHWEST ORDINANCE OF 1787: LEARNING MATERIALS FOR SECONDARY SCHOOL COURSES IN AMERICAN HISTORY, GOVERNMENT, AND CIVICS by John J. Patrick. Nine lessons, 15 documents and a bibliography. Indiana Committee for the Humanities, 1500 North Delaware Street, Indianapolis, IN 46202. 84 pp. $10.00.

OUR UNITED STATES CONSTITUTION**,** Reproducible materials for upper elementary schools by Denee Corbin and Frederick Drake. One hundred eleven pages of lessons with student worksheets. Order from Perfection Form Company, 1000 N. 2nd Avenue, Logan, IA 51546; 1-800-831-4190. $8.95. Product no. 72457.

TEACHING ABOUT THE CONSTITUTION**,** NCSS Bulletin No. 80. Clair W. Keller and Denny Schillings, ed. National Council for the Social Studies, 3501 Newark Street, N.W., Washington, D.C. 20016. 122 pp.

A YOUNG CITIZEN'S GUIDE TO THE UNITED STATES CONSTITUTION**,** by Helen H. Carey and Judith E. Greenberg. The New York Times Company, 229 West 43rd Street, NY, NY 10036.

Books

CONLEY, PATRICK T. ***FIRST IN WAR, LAST IN PEACE: RHODE ISLAND AND THE CONSTITUTION, 1786–1790.*** Rhode Island Bicentennial Foundation, Bristol County Courthouse, 240 High Street, Bristol, RI 02809; 401-253-1787.

HEPBURN, MARY A., ED. ***CONSTITUTION 200: A BICENTENNIAL COLLECTION OF ESSAYS.*** Carl Vinson Institute of Government, Terrell Hall, University of Georgia, Athens, GA 30602.

KUKLA, JON, ED. ***THE BILL OF RIGHTS: A LIVELY HERITAGE.*** Virginia State Library, Richmond, VA 23219-3491. $25.00.

LERNER, RALPH. ***THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC.*** Cornell University Press, 124 Roberts Place, P. O. Box 250, Ithaca, NY 14851; 607-257-7000. 256 pp. $24.95.

LOSS, RICHARD, ED. ***CORWIN ON THE CONSTITUTION; VOLUME III: THE JUDICIARY.*** Cornell University Press, 124 Roberts Place, P. O. Box 250, Ithaca, NY 14851; 607-257-7000.

O'CONNOR, THOMAS H. AND ROGERS, ALAN. ***THIS MOMENTOUS AFFAIR: MASSACHUSETTS AND THE RATIFICATION OF THE CONSTITUTION OF THE UNITED STATES.*** Trustees of the Public Library of the City of Boston (Massachusetts), 1987.

STEVENS, RICHARD G. ***FRANKFURTER AND DUE PROCESS.*** University Press of America, 4720 Boston Way, Lanham, MD 20706; 301-459-3366. 269 pp. $28.00.

Television, Video Cassettes

THE CONSTITUTION PROJECT, a series of seven one-hour television programs produced with WHYY Television. The Constitution Project, P.O. Box 1787, Portland, OR 97207; 503-224-6722.

COVENANT: PEOPLE OF THE LIVING LAW**,** documentary on two systems of law: the Halakah of the Jewish people and the United States Constitution. Dept. of Radio and Television, Jewish Theological Seminary of America, 3080 Broadway, NY, NY 10027; 212-678-8020.

PORTRAITS OF JUSTICE: MINNESOTA'S FEDERAL DISTRICT COURT JUDGES**,** 60-minute videotape of interviews with ten former and sitting judges. Intermedia Arts Minnesota, 425 Ontario Street, S.E., Minneapolis, MN 55414; 612-627-4444.

Touring Plays

THE POLITICIAN OUT-WITTED: THE CONSTITUTIONAL DEBATE ON STAGE (a 1788 play by Samuel Low). Produced by The East Lynne Company, Inc., 281 Lincoln Avenue, Secaucus, NJ 07094; (201) 863-6436.

Computer Software

THE CONSTITUTION PAPERS**,** an electronic compendium of 45 historical documents. Electronic Text Corporation, Dept. D, 5600 N. University Avenue, Provo, UT 84604; 801-226-0616.

Washington, D.C., 1850. Library of Congress.

Bicentennial Programs at Columbia University

One of several major commemorations at Columbia University of the 200th anniversary of the federal Constitution was the special three-month exhibition, "Columbians and the Establishment of the Federal Constitution, 1781–1791," in the Rare Book and Manuscript Library. Drawn entirely from the University's collections, the items on view included rare manuscripts, diaries, letterbooks, documents, pamphlets, broadsides, maps, newspapers, portraits, miniatures, sculpture, engravings, and books. The exhibit examined the contributions of seven notable lawyers connected with Columbia—graduates Gouverneur Morris, Robert R. Livingston, Egbert Benson, Richard Harison, John Jay, Alexander Hamilton, and the third president of Columbia, William Samuel Johnson—to the building of an American nation and government. The exhibit documented that at least one of these men was present at every significant juncture in the process of nation-building and Constitution-making that resulted in the establishment of a strong and flexible system of government.

At the University's Gino Speranza Lectures on October 8, three nationally prominent scholars spoke on "Columbians as Chief Justices: John Jay, Charles Evans Hughes, and Harlan Fiske Stone." Speaking on Jay was Richard B. Morris, Gouverneur Morris Professor Emeritus of History and editor of The Papers of John Jay at Columbia; speaking on Hughes was Paul A. Freund, Carl M. Loeb University Professor Emeritus at Harvard; and speaking on Stone was Herbert Wechsler, Harlan Fiske Stone Professor Emeritus of Constitutional Law and Special Lecturer at the Columbia Law School. Acting Provost Fritz Stern opened the symposium; Barbara Aronstein Black, Dean of the School of Law, served as moderator. Commentators were Wilfred Feinberg, Chief Judge of the U.S. Court of Appeals, Second Circuit, and Walter Gellhorn, University Professor Emeritus, Columbia University.

Project '87 and The League of Women Voters Education Fund Constitutional Forums

In 1987, with the support of the Ford Foundation, the League of Women Voters Education Fund and Project '87 held two Constitutional Forums to honor the Bicentennial of the Constitution. The first forum, entitled "The Constitution and the Courts: Text, Original Intent and the Changing Social Order," was moderated by Sander Vanocur of ABC News. The panelists were the Honorable Robert H. Bork, Judge, United States Court of Appeals for the District of Columbia; the Honorable Patricia M. Wald, Chief Judge, United States Court of Appeals for the District of Columbia; the Honorable Shirley S. Abrahamson, Justice, State Supreme Court of Wisconsin; and Dr. Jack W. Peltason, Chancellor, University of California, Irvine.

The second forum, entitled "Mr. Madison's Constitution and the Twenty-First Century," was moderated by Cokie Roberts of National Public Radio. The panelists were The Honorable Shirley M. Hufstedler, of Hufstedler, Miller, Carlson & Beardsley, Los Angeles; Hedrick Smith, Chief Washington Correspondent for *The New York Times Magazine*; Austin Ranney, Chairman, Department of Political Science, University of California, Berkeley; and Eddie Williams, President, Joint Center for Political Studies, Washington, D.C.

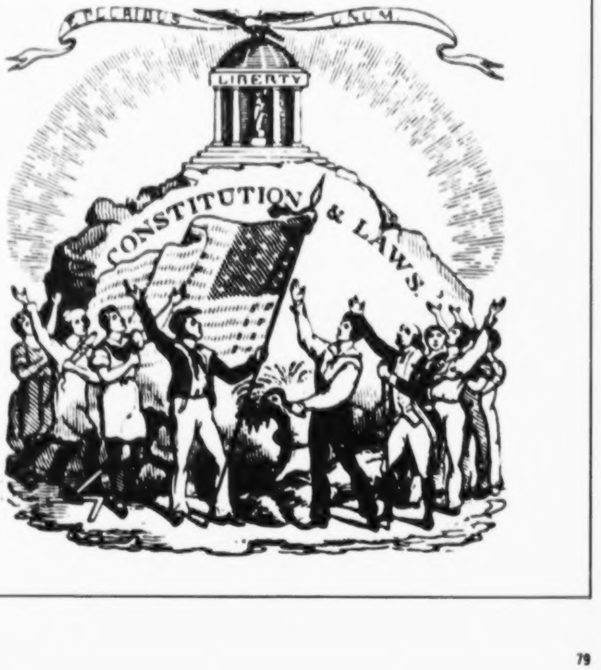
Videocassettes of the two forums are available from Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. (Half-inch VHS cassettes, $35; three-quarter inch, $50; *orders must be prepaid.*) Each cassette is accompanied by a discussion guide, available separately from the League of Women Voters Education Fund, 1730 M Street N.W., Washington, D.C. 20036 ($1.75; $1.25 to members).

Constitution Day September 17, 1987

The Bicentennial of the day the Federal Convention adopted the Constitution was observed in communities all across the United States as well as in Washington, D.C. and Philadelphia, site of the Convention.

More than 100,000 people gathered on the Mall in Washington, D.C., on the eve of Constitution Day, September 16, 1987, for the nationally-televised "Celebration of Citizenship" sponsored by the Commission on the Bicentennial of the United States Constitution and 25,000 visitors viewed the four pages of the Constitution in an 87-hour vigil, from September 13 to September 17, at the National Archives Rotunda, also in Washington.

In Philadelphia on September 17, 16,000 participants joined the "Grand Federal Procession," a parade of thirty floats and twenty-five bands. At 4 p.m., a national and international bell-ringing ceremony marked the hour the Constitution was signed.



Mr. Madison's Constitution and the Twenty-First Century

With the support of a grant from the CSX Corporation, Project '87 held its final conference in Williamsburg, Virginia in October 1987, co-sponsored by the Virginia Commission on the Bicentennial of the United States Constitution. For three days, participants at the National Center for State Courts examined the design of the government and the issues of governance that this country will confront in the coming decades. The following scholars led specific discussions:

Robert A. Dahl (Yale University)—The Design of National Government: Separation of Powers

Elinor Ostrom (Indiana University)—The Design of National Government: Federalism

Kay Lawson (San Francisco State University)—Organizing the Electorate: Districts, Parties, Campaigns

Leon D. Epstein (University of Wisconsin, Madison)—Organizing the Government: Political Parties

Thomas E. Cronin (Colorado College)—Congress and the Presidency

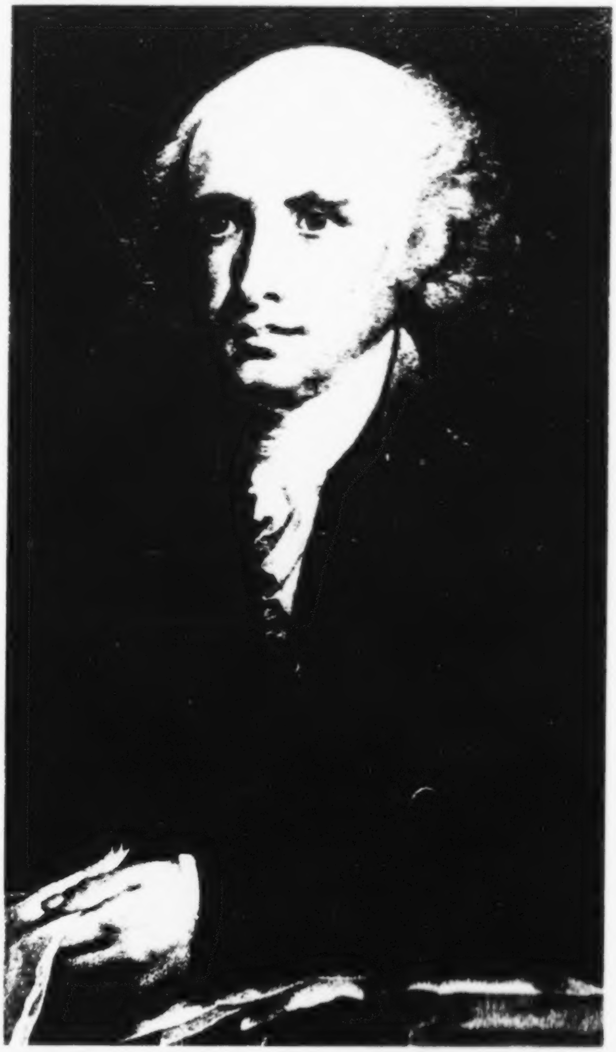
Walter Berns (Georgetown University)—The Independent Judiciary

Otis L. Graham (University of North Carolina)—Constitutional Change

James MacGregor Burns (Williams College)—Common Concerns

Panelists included Herman Belz (University of Maryland), Roger Davidson (University of Maryland), Martha Derthick (University of Virginia), I.M. Destler (Institute for International Economics), Matthew Holden, Jr. (University of Virginia), A. E. Dick Howard (University of Virginia), Richard B. Morris (Columbia University), Austin Ranney (University of California, Berkeley), Donald L. Robinson (Smith College), Arthur Schlesinger, jr. (City University of New York), Hedrick Smith (*New York Times Magazine*), James L. Sundquist (Brookings Institution).

Two public events accompanied the conference: a constitutional forum on the same subject, co-sponsored with the League of Women Voters Education Fund and supported by the Ford Foundation and a special lecture by Arthur Schlesinger jr. entitled "Two Cheers for the Separation of Powers." Both events took place at the College of William and Mary.



Chronology *continued from inside front cover*

June 7, 1790: Rhode Island ratifies the Bill of Rights.

July 16, 1790: George Washington signs legislation selecting the District of Columbia as the permanent national capital, to be occupied in 1800. Philadelphia will house the government in the intervening decade.

December 6, 1790: All three branches of government assemble in Philadelphia.

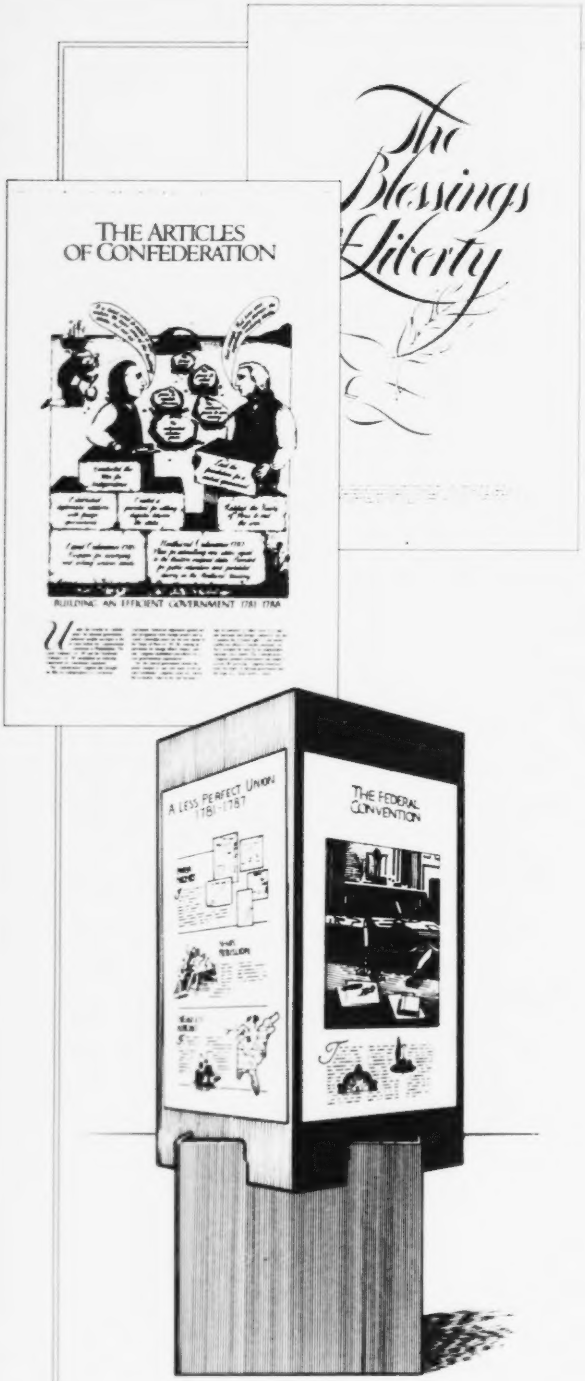
January 10, 1791: Vermont ratifies the Constitution.

March 4, 1791: Vermont is admitted to the Union as the fourteenth state.

November 3, 1791: Vermont ratifies the Bill of Rights.

December 15, 1791: Virginia ratifies the Bill of Rights, making it part of the United States Constitution.

Three of the original thirteen states did not ratify the Bill of Rights until the 150th anniversary of its submission to the states. Massachusetts ratified on March 2, 1939; Georgia on March 18, 1939; and Connecticut on April 19, 1939.


THE ARTICLES OF CONFEDERATION
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